Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

TRANSCRIPT OF RECORD

In Five Volumes

Supreme Court of the United States

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MARY W. STEWART, et al.,

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vs.

UNITED STATES OF AMERICA,

Respondent.

VOLUME I

(Pages 1 to 354)

Pleadings

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9507

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Transcript of Record

In 4 Volumes

VOLUME I

(Pages 1 to 354)

Pleadings

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 10-5-5-40

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In the District Court of the United States for the Northern District of California, Southern Division

In Equity—No. 2685-S

UNITED STATES OF AMERICA,
Complainant,

vs.

MARY W. STEWART, EVADNE B. MIDDLEMAS, LOUISE DeVOE BRICKELL, HOWARD BRICKELL, IDA M. BRICKELL, Heirs and Distributees of JOHN C. BRICKELL, Deceased, RUSS INVESTMENT CO., a corporation, SEARS POINT TOLL-ROAD CO., a corporation, FRANK E. KNIGHT, HENRY A. KENDALL, JOSEPH DUBEAULT, WILFRED DUBEAULT, CHARLES J. MONAHAN, W. H. HEALY, JAMES IRVINE, CALIFORNIA PACIFIC REALTY CO., a corporation, BAY LAND CO., a corporation, FIELD AND TULE LAND

CO., a corporation, PACIFIC GAS AND ELECTRIC CO., a corporation, AMERICAN TRUST CO., a corporation, CALIFORNIA PACIFIC TITLE AND TRUST CO., a corporation, WEST END LAND CO., a corporation, AMERICAN SECURITIES CO., a corporation, HENRY CLAUDE KETTLEMAN, C. D. HILLMAN, sued as First Doe, JAMES CLAYTON, sued as Second Doe, E. G. SWANBERG, sued as Third Doe, A. O. STEWART, husband of Mary W. Stewart, sued as Fourth Doe, J. C. AITKEN, sued as Fifth Doe, H. V. CASEBOLT, sued as Sixth Doe, H. W. DAVIS, sued as Seventh Doe, Eighth Doe, Ninth Doe, EDMUND BURKE, sued as Tenth Doe; also all other persons unknown claiming any right, title, estate, lien, or interest in the real property described in the Complaint, adverse to Complainant's title thereto,

Defendants.

AMENDED BILL OF COMPLAINT

Comes now the United States of America, by its Solicitor, acting under the instructions and at the direction of the Attorney General of the United States, and, by leave of the Court first had and obtained, brings this Amended Bill of Complaint against the defendants, and [1*] alleges:

*Page numbering appearing at top of page of original Certified Transcript of Record.

I.

That the places of residence of the known defendants are as follows:

Each of said individual defendants, as well as the defendants sued herein under fictitious names, reside in the City and County of San Francisco, in the Southern Division of the Northern District of California, save and except, Evadne B. Middlemas, who resides at Menlo Park, San Mateo County, California; Frank E. Knight, Henry A. Kendall, Joseph Dubeault, Wilfred Dubeault, and Charles Monahan, each of whom resides in or near Eureka, Humbolt County, California; C. D. Hillman, sued herein as First Doe, who resides at Seattle, State of Washington; Henry Claude Kettleman, whose residence is wholly unknown; James Clayton, sued as Second Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe and H. W. Davis, sued as Seventh Doe, each of whom reside in or near Vallejo, Solano County, California; and Edmund Burke, sued herein as Tenth Doe, who resides at Los Angeles, California.

Each of said corporate defendants is a corporation organized under and by virtue of the laws of the State of California and has its principal place of business in the City and County of San Francisco in the Division and District aforesaid, save and except the Russ Investment Co., a corporation, which has its principal place of business at Eureka, Humboldt County, California.

II.

That the complainant, United States of America, is the owner of, and has since the year 1852, occupied as a part of the Mare Island Navy Yard Reservation for [2] public, to-wit: military and naval purposes, and has been and is entitled to the possession of the following described land, to-wit:

Those certain lands situated in the Counties of Napa and Solano, in the Northern District of California in Townships 3 and 4 North, Range 4 West and in Townships 3 and 4 North, Range 5 West, M. D. B. and M. including all of the lands embraced in State Swamp Survey No. 569, Solano County, wherein the land is particularly described as follows:

Beginning at a stake on the west bank of Napa Bay, 72 Chains West of the northeast corner of section 34 township 4 north range 4 west; thence west along the section lines 328 Chains to a stake on the south bank of Huichica Creek, now Napa Slough, at the northeast corner of Section 35 township 4 north range 5 west; thence along said bank of said creek as follows:

North 84¾° west 35 chains, north 75° west 42.50 chains, south 84¼° west 39 chains; thence south 60° west 17.50 chains to section line; thence south 55° west 11.50 chains, south 22° west 13.50 chains to the county line of Napa and Solano Counties; thence south 4° west 10.70 chains to San Pablo Bay; thence south

44¾° east 15.10 chains, south 67° east 38.10 chains, south 75° east 42.80 chains, south 61° east 76.30 chains, south 63¾° east 42.80 chains, south 69° 10′ east 61 chains, south 67° 40′ east 63.87 chains, south 68¼° east 57.20 chains, south 65° 20′ east 45.20 chains, south 66¼° east 68 chains, south 80° east 40.50 chains to the west line of Swamp Land Survey No. 34; thence north along said last line 22.33 chains to a point 20 chains south of the center of Section 10, township 3 north range 4 west; thence east along the north line of said survey 30 chains to the west bank of Napa Bay; thence along said bank north 12¾° west 20.30 chains to the mouth of Dutchman Slough; thence north 2½° west 85 chains to south Slough, north 34½° west 12 chains, north 75° west 17 chains, north 25° west 43 chains, north 12½° west 63.50 chains to the place of beginning containing 7413.48 acres more or less, together with all accretions, natural or artificial, to said lands or any part thereof.

(a) In said State Survey said lands are further designated and described as being:

"Fractional section 3, Entire 4, 5, Fractional 6, 7, 8 and 9, W. Frl. ½, W. frn. of NE ¼, and N. frn. of SE ¼ of 10, and small frns. in NE ¼ [3] of NW ¼ of 15, T 3 N, R 4 W. Frl. Sections 1 and 2 in 3 N, 5 W. Entire Sections 31, 32, 33 and W. frl. ½ of 34, T 4 N, R 4 W. S. frn. of SE ¼ and S frn. of SW ¼ of 26

S frn. of SW 1/4 and S Frn. of SE1/4 of 27 and Fractional sections 34 and 35 and Entire 36 in T 4 N, R 5 W, Base and Meridian of Mount Diablo, containing 7413.48 acres."

(B) Upon the officially accepted and approved United States township plats and lands are represented and shown as being:

Fractional sections 3, 4, 5, 6, 8, 9, 10, 15 and 16, T. 3 N., R 4 W. Fractional Sections 31, 32, 33 and the part of Section 34 west of Napa River, T 4 N., R 4 W. Fractional Section 1 T. 3 N., R. 5 W. The parts of Sections 26 and 27 South of Huichica Creek also called Napa Slough, the part of Section 34 East of Sonoma Creek and fractional sections 35 and 36, T. 4 N., R. 5 W., all M. D. B. and M., together with all accretions natural, or artificial to said lands or any part thereof.

III.

By an instrument dated May 2, 1841, executed by Juair B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Government of Mexico to one Victor Castro of the land above described, a copy of which said grant is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint, said instrument was filed for record in the office of the County Recorder of and for Sonoma County, California, on July 28, 1852, and George W. P. Bissell, and William H. Aspinwall having succeeded to the rights and title of said Victor Castro under said

grant, on August 31, 1852, filed in the office of the Board of Land Commissioners, empowered to ascertain and settle private land claims in the State of California, their petition seeking the confirmation to them of their title to the lands included in said grant to Victor Castro as set out herein. Such [4] proceedings were thereupon had before said Board of Land Commissioners including the *take* of evidence, that a decree was duly given, made and entered by said Board, confirming to the said petitioners, their right, and title in and to the lands included in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al., v. The United States.

Decree of Confirmation.

In this case after the hearing the proofs and allegations, it is adjudged by the Commission that the claim of the said petitioners is valid, and it is therefore *decree* that their application for a confirmation thereof be allowed.

"The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge."

Filed in office May 8, 1855.

R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners."
GEORGE FISHER,
Sec'y.

IV.

That the said Board of Land Commissioners was vested with power and authority to make such confirmation by the Act of Congress approved March 3, 1851, (9 stats. 631) and pursuant to the terms of section 8 of which Act said petitioners, Bissell and Aspinwall, claiming said Mare Island in California under right and title derived from the Mexican Government did present the same to the said Board of Land Commissioners, together with evidence in support of such claim and said Board thereupon did pass upon the evidence so produced and upon the evidence produced in behalf of the United States, and did determine the validity of such claim, and did thereafter, on October 23, 1855, file a certified transcript of said case and of their proceedings and decision with the clerk of the United States District Court for the Northern District of California.

That pursuant to the terms of sections 9 and 10 of said Act, the United States, by its District Attorney, duly presented its petition to the United States District [5] Court for the Northern District of California, the District in which said land was situated, praying a review of said decision and decree of said Board of Land Commissioners, and for a decision on the validity of said claim and duly complied with the law and requirements governing such petition for review. And the said George W. P. Bissell, and William H. Aspinwall, filed their Answer thereto and thereafter such proceedings

were had in such matter that on March 8, 1857, the said District Court of the United States for the District of California, duly gave and made its Order for Judgment in said cause, confirming the said grant and the said decision of the said Board of Land Commissioners, and thereafter on April 15, 1930, the District Court of the United States for the Northern District of California, the successor to said Court duly gave and made its judgment and decree, confirming said decision and decree of said Board of Land Commissioners, and directing the entry of said decree nunc pro tunc as of the second day of March, 1857. Defendants are remote claimants under, successors to, and in privity with, the United States of America, plaintiff and appellant in said appeal from the decision of said Board of Land Commissioners, against which plaintiff and appellant said judgment and decree was entered with respect to paramount title then and there asserted and claimed by said plaintiff and appellant, and defendants are bound by said decree.

V.

The United States of America acquired the title and interest of George W. P. Bissell and William H. Aspinwall [6] in and to the land so conveyed and confirmed to them, and also the title and interest of Mary S. McArthur in said land, as a tenant in common with the said Bissell and the said Aspinwall, by purchase for a valuable consideration, namely: $83,491.00, and received a deed of convey-

ance of said property executed January 4, 1853, a copy of which, hereunto annexed and marked Exhibit "B" is referred to and made a part of this Bill of Complaint. And said deed was duly filed for record and recorded in the County Recorder's office of Solano County, California on April 18, 1853, said Solano County being then and thereafter the County in which said lands were situated.

VI.

On November 6, 1850, the President of the United States by executive order, exempted and reserved from sale, for public purposes, among others, the following tract of land on the eastern side of the Bay of San Pablo, namely "Mare Island" which included the lands described in Paragraph II of this Bill of Complaint.

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of Section 3 of the Act of August 31, 1852, (10 stats. 104) selected the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island and the harbors, waters and anchorages connected therewith and necessary to the use of the same, and within which is included the lands and premises described in paragraph II of this Bill, as a site for the Navy

Yard and Naval [7] Depot provided for by said Act of Congress.

Following said selection, the Secretary of the Navy on February 9, 1853, recommended to the President of the United States, that said land and premises be reserved for public uses, and on February 11, 1853, President Millard Fillmore approved said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and duly and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his order making such reservation is attached hereto, marked Exhibit "C" and hereby referred to and incorporated in this Bill of Complaint. From time to time, the Congress of the United States of America, duly approved, ratified and confirmed said reservations and by various statutes, appropriated large sums to improve the lands comprised therein and authorized their improvement.

VIII.

The lands and premises described in Paragraph II of this Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California under the rule and occupation of Mexico, to Victor Castro, confirmation of which grant was made by the

Board of Land Commissioners to George W. P. Bissell and William H. Aspinwall and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell [8] and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

IX.

Ever since September 16, 1852, the United States has occupied the lands of Mare Island as aforesaid, by and through its Navy Department and officials, using and improving the same for military purposes in connection with the Naval Station, Navy Yard and premises of complainant situated thereon.

The possession of the United States of America has at all times been actual, open, adverse and exclusive and under claim of right, and of absolute ownership in fee of said Mare Island, and under the title and color and claim of title supplied by said reservations and the said deed of January 4, 1853, the said decision of the said Board of Land Commissioners of May 8, 1855, and the said Order of the said District Court of the United States for the District of California duly given and made March 2, 1857, and said Decree of April 15, 1930. The lands of Mare Island during such period and occupancy of the complainant have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said build-

ings and improvements are now used by complainant for naval and military purposes and have been so used since the construction and making thereof; and there was about the year 1873, located upon the land here in question, a dwelling house erected, maintained and occupied by and on behalf of the complainant; a road thereon had been built and used under the authority of complainant; and complainant has used the lands in [9] question for gun range and target practice and has from time to time excavated and dug in said lands and used them for sand and gravel pits, and as a source of supply for such sand and gravel as complainant has required for its use in connection with its use and occupancy of said Naval Reservation. All said real property was used by the complainant in connection with the operation and activities of its Naval and Military forces. In November, 1873, complainant went upon said land described in Paragraph II and posted at frequent intervals thereon, signs and notices that said property was government property, and warning trespassers to keep off thereof.

X.

The lands in question heretofore described in Paragraph II hereof, were claimed by the State of California, under and by virtue of the Act of September 28, 1850, (9 Stats. 519) commonly known as the "Swamp Land Act", by which the whole of those Swamp and Overflowed Lands, made thereby unfit for cultivation, comprising part of the public

domain of the United States of America on the date of the passage and approval of said Act, and remaining unsold, were granted to the State. Said lands were purportedly surveyed in the year 1869 under authority of the State of California, and identified by such survey as survey No. 569 and as containing 7413.48 acres in area, and thereafter the State of California issued its patent purporting to convey said lands included in said survey to George W. Pearson, under date of April 7, 1874, and describing them according to said Survey No. 569.

[10]

XI.

Defendants, and each of them, claim title to the lands described in said survey and in Paragraph II of this Bill through and by virtue of mesne conveyances, vesting in them the purported title of the said George W. Pearson, or some part or parcel thereof. Defendants and each of them claim some right, title or interest in said real property adversely to the right and title of plaintiff, but each of said claims is wholly without right or foundation in law or fact; that there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in Paragraph II of this complaint, adverse to the complainant's ownership, and casting a cloud upon the complainant's title therein; that the claims of said persons are wholly without right or merit in law or in fact.

That complainant is without information as to the dates, tenure and contents of the instruments constituting evidence of the alleged title of the defendants other than as stated herein and is unable therefore to set out herein such instruments held by them.

XII.

That on April 26, 1924, a patent, No. 937055, was issued to the State of California, which patent is in effect, an attempted conveyance of the lands in Townships 3 and 4 North, Range 4 West, M.D.B. and M., described in subparagraph B of paragraph II of this complaint, to the State of California, by the Land Department Officials of the United States, under the provisions of the Act of September 28, 1850, known as the "Swamp Land Act"; that on June 5, 1896, a patent No. 72, was issued to the State of California, which patent is in effect, an attempted conveyance of all of fractional [11] Section 1, Township 3 North, Range 5 West, M.D.B. and M. containing an estimated area of 177 acres, described in subparagraph B, Paragraph II of this Complaint, to the State of California by the Land Department officials of the United States, under the provisions of said "Swamp Land Act;" and that on February 7, 1910, a patent, No. 152, was issued to the State of California, which patent is in effect, an attempted conveyance of the lands in Township 4 North, Range 5 West, M.D.B. and M., described in subparagraph B of Paragraph

II of this Complaint, to the State of California, by the Land Department officials of the United States under the provisions of said "Swamp Land Act;" that each of said above mentioned three patents included and described other lands and tracts not described in Paragraph II of this Complaint and not involved in this suit.

Complaint alleges that each and every one of said above mentioned three patents, in so far as said patents purport to grant or convey, and to the extent that said patents include and describe the lands mentioned in Paragraph II of this Complaint, were and are void, of no force or effect, and have no validity, for the reason that said lands described in said patents were held in private ownership under and by virtue of the aforesaid grant from Mexico at the time of the passage and approval of said "Swamp Land Act," and were not a part and never have been a part of the public domain of the United States or open for entry by private persons, but have at all times since the date of said Mexican grant to Victor Castro, been owned and occupied by complainant as proprietor and by those under whom the complainant claims its proprietary ownership thereof, and for the further reason that said land had been selected for and devoted to the necessary public purposes [12] of the United States and withdrawn from entry by private persons as alleged in Paragraphs VI and VII of this Bill of Complaint, prior to the issuance of said patents to the State of

California, and while the legal title in and to said lands was vested in the United States of America.

XIII.

The true names of defendants sued herein as Eighth and Ninth Doe, and the interest claimed by them respectively to the lands described in Paragraph II of this complaint, are unknown to complainant, and complainant prays that when their true names and the interests claimed by them respectively are ascertained, they may be inserted herein with the same effect as if such defendants were sued in such true names originally.

XIV.

Complainant is without adequate remedy in the premises at law; wherefore that the defendant may full, true, direct and certain answer make to each and all of the allegations and averments in this Amended Bill of Complaint but not under oath, complainant prays:

(1) That the Court adjudge and decree that plaintiff is the owner in fee simple, absolute and possessed of all the real property described in Paragraph II of this Amended Bill of Complaint.

(2) That the Court adjudge and decree that neither the defendants nor any of them ever acquired or now have any right, title or interest in or to the lands described in Paragraph II of this Complaint or any part thereof by reason of the purported patents, conveyances, or instruments mentioned and referred to herein.

(3) That defendants be required to answer and [13] set up the conveyances, instruments, or evidences of title under which they claim, and that the Court adjudge and decree that said conveyances and instruments through and by virtue of which defendants claim to derive a right, title and interest in the lands in question under George W. Pearson, patentee, from the State of California and his grantees, are void and that each such conveyance made to date held by the defendants, be surrendered for cancellation.

(4) That the title in and to the lands described in Paragraph II of this Amended Bill of Complaint, be quieted in the Complainant as against all or any adverse claims of the defendants herein or any of them.

(5) That complainant have such other, further or different relief in the premises as may be agreeable to equity and good conscience.

GEO. J. HATFIELD,
United States Attorney,
Solicitor and Attorney
for Complainant. [14]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Elisha B. Carrier, Special Assistant to the United States Attorney for the Northern District of California, being first duly sworn on oath deposes and says:

That he is one of counsel for the complainant herein and that he has read the foregoing Amended Bill of Complaint and knows the contents thereof and that he verily believes the same to be true.

ELISHA B. CARRIER.

Subscribed and sworn to before me this 28 day of April, 1931.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court,
Northern District of California. [15]

Exhibit "A"

Translation of Title

Manuel Jimeno Casarin Governor ad interim of the Department of the Californias.

(Civil Govt. of Upper California.)

Don Victor Castro is provisionally permitted while the usual steps are being taken, to occupy with horses the Island named "La Yegua" in the Straits of Carquenez.

In consequence let this permission me delivered to the party interested for his security.

Mouterey, Oct. 31, 1840 (signed) Jimeno

(signed) JOSE Z. FERNANDEZ,
Sec. ad interim.

Juan B. Alvarado, regular Constitutional Governor of the Department of the Californias.

Whereas Don Victor Castro a Mexican by birth has petitioned to this Government for the ownership of the Island named "La Yegua" situated in the neighborhood of the Straits of Carquinez in Consequences of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being, in charge of this Government, and in virtue of which the petitioner has repeated again his petition, proving that said Island does not belong to the ownership of any individual, corporation, pueblo, I have in decree of this day declared as I do by these presents declare Don Victor Castro, owner in fee of the said Island in all its extent comformably with the powers conferred on me by the Supreme National Government. In consequence let this be delivered to the party interested, that it may serve him for a title, and for [16] such other purposes as may be convenient.

Given in Monterey, Capital of the Department on the Second Day of the Month of May, 1841.

(Signed) JUAN B. ALVARADO. [17]

Exhibit "B"

To all to whom these presents shall come:

George W. P. Bissell, of the city of San Francisco, in California, William H. Aspinwall of the city of New York, in the State of New York, and

Mary S. McArthur, of the city of Baltimore, Maryland, send greetings:

Whereas the said parties, as tenants in common, are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a navy yard, and for the public use, on behalf of the United States of America, and which has recently been selected for such purpose; and the interests and proportions of the said owners respectively, in the said island, are as follows, that is to say: Of the said George W. P. Bissell, fifty-eight eightieth parts and one-fourth of an eightieth part (the whole being divided into equal eightieth parts); the said William H. Aspinwall, sixteen and three-fourths eightieth parts, and the said Mary S. McArthur, as sole devisee of William P. McArthur, deceased, of the remaining five eightieth parts.

And they have agreed to convey the same to the use of the United States of America, for the consideration hereinafter expressed paid to them severally and respectively, according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now these presents witness: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur, in consideration of the sum of eighty-three thousand four hundred and ninety-one dollars, to them paid, in proportion to their said interests respectively, on behalf of the United States of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released

and quit-claimed, and by these presents do grant, bargain, sell, release and quit-claim unto the United States, all that tract of land and island called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the navy yard there, including all the tule or lowland, and marsh, belonging to the same, or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever, with the mutual agreements that the said grantor shall have the right of establishing a ferry to and from the said island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select, with the assent and approval of the Secretary of the Navy of the United States, for the time being, on the report of the officer or officers at the time representing the Navy Department at San Francisco; for the landing of which ferry, on the said island, a piece of [18] land on the margin and shore of the said island, to be selected and located by the said grantors, their heirs and assigns, with such assent and approval as last afore-

said; however, ferry privilege and landing place shall be subject to the following control and restrictions, on the part of the United States:

That the said ferry and landing place shall at all times, for the purpose of police and the regulations of persons and things in the navy yard, be subject to such orders as the Secretary of the Navy, or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said navy yard and Mare Island; and also, that no building of any kind shall be erected on the landing place without such consent as aforesaid; and also if the Secretary of the Navy, for the time being shall for the security or advantage of the United States, in reference to the said public use of Mare Island, require a removal of the said ferry landing to any other convenient place on the eastern shore of said Mare Island, for the purpose of such landing place, the landing of the said ferry shall be removed to such new landing place, and the ferry privilege shall apply to such new landing place, and all other terms hereof in relation thereto; and soon, from time to time, as changes in this respect may be found necessary on part of the United States; and on every such change it shall be lawful for said grantors, their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purpose of the ferry and on the direction of the Secretary of the Navy, for the time being, it shall be the duty of the said

grantors, their heirs and assigns to conform to such removal with all convenient speed. And the said grantors, for themselves, according to their several interests aforesaid, and each for his heirs and assigns, and for all claiming by or under them respectively, hereby severally covenant to and with the United States of America and their assigns, that they severally, and their heirs and assigns, shall and will, at the request of the United States of America or their assigns, and at their expense execute all such further deeds and other assurances unto them of the premises hereby purporting to be granted, as shall be reasonably advised by their counsel learned in law.

In witness whereof the said George W. P. Bissell, by William H. Aspinwall, his attorney (by letter of attorney dated July 30th, 1852, herewith delivered), and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

[Seal] G. W. P. BISSELL,
Pr. WM. H. ASPINWALL,
Att'y.

[Seal] WM. H. ASPINWALL.

[Seal] MARY S. McARTHUR.

Signed, sealed and delivered in the presence of:
WM. MARRIA,
J. O. LAWRENCE,
J. D. PRATT,
JNO. J. YOUNG.

As to Mary S. McArthur. [19]

State of New York,
New York City and County.

I, Joseph C. Lawrence, commissioner in and for the State of New York, duly appointed and commissioned by the Governor of the State of California to take the acknowledgments and proof of deeds and other instruments of writing under seal; to be used or recorded in same State of California, and to administer oaths and affirmations, do hereby certify that on the day of the date hereof before me personally came William H. Aspinwall, in his individual capacity and as the attorney in fact of George W. P. Bissell, the persons described in and who executed the foregoing deed of conveyance, and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell, one of the parties therein described, by virtue of a power of attorney, duly executed by the said George W. P. Bissell, for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

[Seal] JOSEPH C. LAWRENCE,
Commissioner of the State of California, in and for the State of New York, 68 Water Street, New York.

State of Maryland,
City of Baltimore—ss.

On this 5th day of January, A. D. 1853, before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me, and having signed and sealed the same before me, acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

JABEZ D. PRATT,
Commissioner for California.

State of California,
County of Solano—ss.

The foregoing instrument of writing was received by me for record on the 18th day of April, A. D. 1853, at 9 o'clock a.m.

JAS. P. VAUGHN,
County Recorder. [20]

EXHIBIT "C"

Navy Department
February 9th, 1853

Sir:

By the 3rd Section of the Act of last Session, Chapter CIX Statutes at large, making appropriations for the Naval Services, the Secretary of the Navy is "authorized, and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of Public Lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the Site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be found to exist in the United States or not, it is proper that the government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress referred to, authorizes the reservation, if it may be thought expedient to make

it, in case this land should belong to the public domain. [21]

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reported to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your Obt. Servt.,

JOHN P. KENNEDY.

To the President

Washington, February 11, 1853

The Reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate Department that the Reservation may be properly and legally recorded.

MILLARD FILLMORE.

[Endorsed]: Filed May 21, 1931. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[22]

In the District Court of the United States for the Northern District of California,
Northern Division.

Equity Suit No. 483

[Title of Cause.]

ORDER FOR TRANSFER OF SUIT TO SOUTHERN DIVISION.

It is hereby ordered, that the above entitled Equity Suit be, and the same hereby is, transferred from the Northern Division to the Southern Division of the United States District Court for the Northern District of California pursuant to the written stipulation of the Solicitors and Attorneys of record duly signed and filed herein according to the provisions of Section 58 of the Judicial Code (Section 119, U. S. C. A.), and that the Clerk of this Court regularly transmit the entire file and all the papers and documents, in conformity with law, to the Clerk of the Court for said Southern Division.

Dated: Sept. 8th, 1930.

Signed FRANK H. KERRIGAN,
Judge of United States District Court.

[Endorsed]: Filed Sep. 8, 1930. [23]

In the District Court of the United States for the Northern District of California,
Southern Division.

In Equity—No. 2685-S

[Title of Cause.]

AMENDMENTS TO AMENDED BILL OF COMPLAINT

Leave of the Court first had and obtained, plaintiff above named, by Geo. J. Hatfield, Esq., United States Attorney, its attorney and solicitor, files this Amendment to its Amended Bill of Complaint to add thereto a paragraph numbered IV (a).

IV (a).

In July, 1877, the Surveyor General of California in compliance with the Thirteenth Section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave notice that the same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to-wit, the Alta California, and one published near the land surveyed, to-wit, the Vallejo Evening Chronicle published in the City of Vallejo, County of Solano, State of California, and retained in his office, for public inspection, [24] the survey and plat until ninety days from the date of the first publication in

San Francisco expired; that no objections were made to said survey, and the said Surveyor General of California approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; thereafter the Commissioner of the General Land Office approved said survey and plat and caused the same to be filed in a jacket, called the Mare Island Jacket, in the file of military reservations in the General Land Office; thereafter on September 22, 1905 the Commissioner of the General Land Office expressly approved, used and acted on the said survey and plat, and thereafter on September 28, 1905 the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on the said survey and plat; that the lands described in Paragraph II of Plaintiff's Amended Bill of Complaint are all included within the exterior limits of said survey and of said confirmed Spanish Grant of Mare Island, as so surveyed.

Paragraph IX of Plaintiff's Amended Bill of Complaint is hereby amended to read as follows:

IX.

Continuously since September 16, 1852, and up to and including the year 1880, the United States occupied the lands of Mare Island as aforesaid, by and through its Navy Department and officials, using and improving the same for military purposes

in connection with the Naval Station, Navy Yard and premises of plaintiff situated thereon.

The possession of the United States of America during all said period was at all times actual, open, adverse [25] and exclusive and under claim of right, and of absolute ownership in fee of said Mare Island, and under the title and color and claim of title supplied by said reservations and the said deed of January 4, 1853, the said decision of said Board of Land Commissioners of May 8, 1855, and the said order of the said District Court of the United States for the District of California duly given and made March 2, 1857, and said Decree of April 15, 1930, by relation. The lands of Mare Island during such period and occupancies of the plaintiff were improved for military and naval purposes by the constuction of buildings and improvements thereon and of signs warning trespassers that the said premises were Government property. There was about the year 1873 located upon the land here in question, a dwelling house erected, maintained and occupied by and on behalf of the plaintiff; a road had been built thereon and used under the authority of plaintiff; and plaintiff used the lands in question for gun range and target practice, and from time to time excavated and dug in said lands and used them for sand and gravel pits, and as a source of supply for such sand and gravel as plaintiff required for its use in connection with its use and occupancy of said Naval Res-

ervation. All said real property was used by plaintiff in connection with the operation and activities of its Naval and Military forces. In November, 1873, plaintiff went upon said land described in Paragraph II and posted at frequent intervals thereon signs and notices that said property was Government property and warning trespassers to keep off thereof.

That on the 8th day of July, 1886, or thereabouts, the Circuit Court of the United States for the District of California, in an action of ejectment therein pending, and [26] numbered 3140 in the records and files of said Court, in which the plaintiff was not a party or represented, and in which San Francisco Savings Union, a corporation, and others were plaintiffs, and John Irwin, then Commandant of Plaintiff's said Navy Yard, was defendant, gave and made a judgment in favor of said plaintiffs and against said defendant for the recovery by said plaintiffs from said defendant of the possession of said lands in Paragraph II of said Amended Bill of Complaint described, and in consequence of said judgment, said defendants and their predecessors have entered upon and occupied said land and withheld the possession thereof from plaintiff, without the consent and through no fault of plaintiff, and defendants have no other entry or right of entry, or possession, except after said judgment.

Wherefore, plaintiff prays that the said paragraph numbered IV (a) be deemed added to Plaintiff's Amended Bill of Complaint, and that said

Paragraph IX as hereinabove set forth be substituted for Paragraph IX of Plaintiff's Amended Bill of Complaint.

GEO. J. HATFIELD,
United States Attorney,
Attorney and Solicitor for Plaintiff. [27]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I. M. Peckham, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney, and is familiar with the facts in the above entitled action, and makes this verification on behalf of the United States of America; that he has read the foregoing Amendments to the Amended Bill of Complaint, knows the contents thereof, and that the same are true of his own knowledge except as to matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

I. M. PECKHAM.

Subscribed and sworn to before me this 13 day of May, 1932.

[Seal] ERNEST E. WILLIAMS,
United States Commissioner for the Northern District of California.

[Endorsed]: Filed May 23, 1932. [28]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS MARY W. STEWART, SEARS POINT TOLL-ROAD CO., A CORPORATION, AMERICAN TRUST COMPANY, A CORPORATION, BAY LAND COMPANY, A CORPORATION, FIELD AND TULE LAND COMPANY, A CORPORATION, AND WEST END LAND COMPANY, A CORPORATION, TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO.

Come now defendants Mary W. Stewart, Sears Point Toll-Road Co., a corporation, American Trust Company, a corporation, [29] (sued herein as American Trust Co.), Bay Land Company, a corporation, (sued herein as Bay Land Co.), Field and Tule Land Company, a corporation, (sued herein as Field and Tule Land Co.), and West End Land Company, a corporation, (sued herein as West End Land Co.), and answering complainant's Amended Bill of Complaint on file herein and the Amendments thereto on file herein, (all hereinafter for convenience referred to as the Bill), admit, deny and allege as follows, to wit:

I.

Answering the allegations of Subdivision II of the Bill, these defendants deny that complainant is the owner of, or at any time subsequently to September 28, 1850, ever was the owner of, the lands

or any of the lands described in said Subdivision II of the Bill; deny that complainant has ever occupied said lands or any thereof, either as a part of the Mare Island Navy Yard Reservation, or for public or military or naval purposes, or otherwise or at all; and deny that complainant has ever been in the possession of said lands or any thereof, or that it is, or at any time since September 28, 1850, ever was, entitled to the possession of said lands or any thereof.

Further answering the allegations of said Subdivision II of the Bill, these defendants allege the fact to be that each of them is the owner of a portion of or an interest in the said lands described in the Bill, their respective ownerships and interests being those more particularly set forth in "Exhibit A" attached hereto and by this reference hereby made a part of this Answer; that the lands described in said "Exhibit A" have for more than fifty years last past been in the possession of these defendants and of their respective predecessors in interest (exclusive of complainant); that these defendants and their said predecessors were entitled to the possession of [30] said lands during all of said period; and that said possession of said lands by these defendants and their respective predecessors in interest has at all times been open, notorious, under claim of right and under color of title, and adverse to complainant and to the whole world.

II.

Answering the allegations of Subdivision III of the Bill, these defendants deny that by an instrument dated May 2, 1841, or otherwise, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, or by any other person, a grant was made by the Government of Mexico to Victor Castro of the lands described in the Bill, or of any of said lands, or of any lands at all; deny that any of the lands described in the Bill was ever granted by the Mexican Government to any person whomsoever; deny that "Exhibit A" to the Bill is, and allege that it is not, a copy of the said grant in the Bill alleged, or of any grant made by the Government of Mexico; deny that there was ever any grant made by the Government of Mexico to Victor Castro which was filed for record in the office of the County Recorder of and for Sonoma County, California, either on July 28, 1852, or at any other time, and allege that no such grant was ever made; deny that any grant by the Mexican Government of any of the said lands described in the Bill was ever filed for record in the office of said County Recorder for Sonoma County, California, and allege that no such grant was ever so filed; deny that said Victor Castro ever had any right or title to said above-mentioned lands, or any of them, and allege that he never had any right or title in or to any of said lands; deny that George W. P. Bissell and William H. Aspinwall, or either of them, ever acquired any right or title thereto, from Victor Castro or other-

[31] wise, or that they or either of them ever had any right or title in or to said lands or to any thereof, and allege that neither of them ever had any such right or title; deny that said Bissell and Aspinwall, or either of them, or anyone ever filed in the office of the Board of Land Commissioners empowered to ascertain and settle private land claims in the State of California, either on August 31, 1852, or at any other time, their or any petition seeking the confirmation to them of the lands or any of the lands described in the Bill and allege that no such petition was ever so filed; deny that any proceedings were ever had before said Board of Land Commissioners with respect to said above-mentioned lands, or any of them, or that any decree was ever given or made or entered by said Board confirming to anyone the said lands or any thereof, and allege that no such proceedings were ever had and that no such decree was ever given or made or entered.

Further answering the allegations of said Subdivision III of the Bill and also the allegations of the subsequent subdivisions thereof, these defendants allege the fact to be that none of the lands described in the Bill is now or ever was a part of Mare Island; allege that none of said lands was ever included or involved in, or affected by, any proceedings whatever taken or had for the confirmation of any grant or alleged grant by the Mexican Government to Victor Castro of said Mare Island, or of any other

grant or alleged grant by said Mexican Government.

Further answering the allegations of said Subdivision III of the Bill and also the allegations of the subsequent subdivisions thereof, these defendants allege the fact to be that Victor Castro claimed that Mare Island was granted to him on or about May 20, 1841, by the Government of Mexico, acting through [32] Juan B. Alvarado, Constitutional Governor of the Department of California; that the Mare Island so claimed by said Victor Castro did not include the lands or any of the lands described in the Bill; that in fact no such grant was ever made by said Juan B. Alvarado or by the Mexican Government to said Victor Castro and that the pretended grant under which said Victor Castro claimed was in fact executed by said Alvarado, if executed by him at all, long after the acquisition of California by the United States and was fraudulently antedated May 20, 1841; that said Bissell and Aspinwall, claiming to have succeeded to the rights and title of said Victor Castro to Mare Island under said grant, filed with said Board of Land Commissioners on or about August 31, 1852, a petition against the complainant herein seeking the confirmation to the said Bissell and Aspinwall of said Mare Island; that before any proceedings were had upon said petition and before any evidence was taken thereon and on or about the 4th day of January, 1853, said Bissell and Aspinwall, and one Mary

S. McArthur, sold and conveyed to the complainant herein (i. e., to the defendant in said proceedings before said Board of Land Commissioners) all of their right and title under said grant and in and to said Mare Island; that thereupon complainant herein became the owner and in control of both sides of said proceedings and was and thereafter at all times continued to be the dominus litis upon both sides thereof; that thereafter complainant permitted certain proceedings to be had before said Board and on the 8th day of May, 1855, permitted said Board to make and file a decree in said proceedings purporting to confirm said claim to Mare Island to said Bissell and Aspinwall; that said decree was and is null and void and of no effect. [33]

That thereafter and on the 23rd of October, 1855, complainant caused and permitted to be filed in this Honorable Court a petition for a review of said decision and decree of said Board, not for the purpose of defending or establishing any right, title or interest as against said claimants, Bissell and Aspinwall, but solely for the purpose of obtaining a judgment and decree to be used against third persons, and caused and permitted said matter to be submitted to this Honorable Court; that thereafter, without any hearing by this Honorable Court and without its considering the transcript of the aforesaid proceedings before said Board of Land Commissioners, which had theretofore been filed with this Honorable Court, and without considering or adjudicating the merits of the matter and solely

by reason of the consent of the complainant herein, this Honorable Court made a minute order on March 2, 1857, purporting to be for a decree confirming said decree of said Board; that there were no further steps or proceedings taken in said matter by complainant or by said ostensible claimants (other than an ineffectual appeal to the United States Supreme Court which was dismissed at the direction of the Attorney General of the United States) nor was there ever any decree made or entered therein, either pursuant to said last-mentioned minute order or otherwise, until 73 years thereafter, when, only 7 days before the filing of the Bill herein, and with the bringing of this suit directly in view and for the purpose of adversely affecting the rights of the defendants in this suit (complainant claiming that the lands described in the Bill herein were and are a part of Mare Island) and without giving these defendants or any of them any notice or opportunity to be heard and wholly ex parte, claimant requested and caused this Honorable Court on April 15, 1930, to make and sign a [34] decree nunc pro tunc as of March 2, 1857, purporting to confirm the said decree of said Board of Land Commissioners; that complainant procured said decree nunc pro tunc for the purpose of adversely affecting the rights of the defendants in this suit notwithstanding that, subsequently to the making of said minute order of March 2, 1857, the following proceedings had been had and the following things had occurred:

(a) On or about the 3rd day of January, 1883, an action of ejectment was brought in the Superior Court of the State of California in and for the County of Solano by D. W. Bouldin and A. P. Moore against Thomas S. Phelps, who was then the Commandant of the Mare Island Navy Yard and in possession of Mare Island, to recover the possession of said Mare Island; that thereafter and on the 14th day of January, 1883, said action was removed by said defendant Phelps to the United States Circuit Court, Ninth Judicial Circuit, for the District of California; that the plaintiffs in said action claimed title to said Mare Island under the aforesaid Mexican grant from Juan B. Alvarado to Victor Castro and under mesne conveyances from said Victor Castro, which conveyances were claimed to have been made prior to the alleged conveyance from Victor Castro under which said Bissell and Aspinwall claimed; that defendant Phelps was represented in said action by S. G. Hilborn, the United States District Attorney for the District of California, and, in addition thereto, the Attorney General of the United States appointed Judge A. L. Rhodes as a special assistant attorney of the United States to appear in said case on behalf of complainant [35] and to assist in the defense of said action, and said counsel controlled and conducted the defense of said action; that the only right, title or in-

terest in or to said lands set up by defendant Phelps in defense of said action was the title to the aforesaid lands claimed by complainant herein, said defendant and said counsel expressly disclaiming that said defendant had any other right, title or interest in or to said lands or any part thereof; that said defendant and said counsel asserted and produced evidence showing that said Mexican grant from said Juan B. Alvarado to said Victor Castro of said Mare Island was in fact fraudulent and void and was not made until 1850 and long after the Mexican sovereignty of California had ceased, and that said grant was fraudulently antedated to May 20, 1841; that said cause was tried before Circuit Judge Lorenzo Sawyer and District Judge Ogden Hoffman, who found and held that said Mexican grant of Mare Island was in fact fraudulent and void; that the court's opinion in said cause is reported in full in 30 Fed. 547.

(b) Prior to the 13th day of September, 1883, John Irwin, as commandant of said Mare Island Navy Yard, claimed that the lands described in the Bill were a part of Mare Island and as a result thereof and on said last-mentioned date an action in ejectment was brought in the Superior Court of the State of California in and for the County of Solano by The San Francisco Savings Union, The Bank of California and George A. Nourse, the owners of

said lands and the predecessors in interest of the defendants in [36] this suit, against said John Irwin, for the said lands described in the Bill; that thereafter and on the 6th day of October, 1883, said action was removed by said defendant Irwin to the United States Circuit Court, Ninth Judicial Circuit, for the District of California; that said lands were claimed by the plaintiffs in said action under the Swamp Land Act of September 28, 1850 (9 Stats. 519) as successors in interest to the State of California; that defendant Irwin was represented in said action by said S. G. Hilborn, the United States District Attorney for the District of California, and in addition thereto, the Attorney General of the United States appointed Judge A. L. Rhodes a special assistant attorney of the United States to appear in said case on behalf of the complainant and to assist in the defense of said action, and said counsel in fact conducted the defense of said action; that the only right, title or interest in or to said lands set up by defendant Irwin in defense of said action was the title to the aforesaid lands claimed by complainant herein, said defendant Irwin and said counsel expressly disclaiming that said defendant had any other right, title or interest in or to said lands or any part thereof; that said defendant and said counsel asserted and presented evidence in an attempt

to show that the complainant herein had title to said lands as a part of Mare Island by virtue of being successor in interest of said Victor Castro under the aforesaid Mexican grant of said Mare Island to said Victor Castro and that complainant also had title thereto by virtue of the reservations attempted to be made by the President of the United States referred to in Subdivisions VI and VII of the Bill, said contentions both as to said lands being a part of [37] said Mare Island and included in said grant to Victor Castro and as to said reservations by the President of the United States being in all respects precisely the contentions now made on behalf of the complainant in this suit; that said action was tried before Mr. Justice Field of the United States Supreme Court then sitting on circuit and before District Judge Hoffman and they expressly found and held that said lands were not a part of Mare Island nor were they or any part thereof included within said grant of said Mare Island to said Victor Castro and that none of said lands was affected by the said attempted reservations by the President of the United States mentioned in subdivisions VI and VII of the Bill, and that complainant had no right or title thereto, but that, on the contrary, the title thereto was in the plaintiffs in said action; that the opinion of the court in so holding is reported in full in 28 Fed. 708; that thereafter

the Acting Attorney General of the United States wrote to said Judge Rhodes, special counsel for complainant as aforesaid, and directed him to sue out a writ of error in said action; that pursuant to such direction a writ of error was sued out and the matter brought before the Supreme Court of the United States; that said cause was argued before the Supreme Court of the United States on behalf of the plaintiff in error, the said John Irwin, by Mr. Assistant Attorney General William A. Maury representing the complainant herein; that on the 3rd day of February, 1890, the Supreme Court of the United States affirmed the judgment in favor of said plaintiffs in said action, the Supreme Court's opinion being reported in 136 U. S. 578; that [38] following such affirmance and based thereon complainant thereafter issued patents to the State of California covering all of the lands described in the Bill, all as hereinafter more particularly set forth; that notwithstanding the facts aforesaid and for the purpose of affording a pretended ground for re-litigating the matters which were decided in said action and of adversely affecting the rights of the defendants in this suit, complainant procured the making and entry of said decree nunc pro tunc as aforesaid.

III.

Answering the allegations of Subdivision IV of the Bill, these defendants deny that said Board of

Land Commissioners was vested with or had any power or authority to make the confirmation alleged and set forth in the Bill, either by virtue of the Act of Congress approved March 3, 1851 (9 Stats. 631) or otherwise or at all, but on the contrary allege the fact to be that said Board had no power or authority or jurisdiction in the premises on account of the facts and circumstances set forth in the preceding subdivision of this Answer; admit that said Bissell and Aspinwall, claiming a right to said Mare Island under the aforesaid grant to Victor Castro, presented their said claim to said Board of Land Commissioners, but deny that said Bissell and Aspinwall, or either of them, then had or ever had any right or title to said Mare Island, or any part thereof, derived either directly or indirectly from the Mexican Government or otherwise or at all; allege that prior to the taking or presentation of any evidence before said Board, said Bissell and Aspinwall sold and conveyed all of their right and title to said Mare Island to the complainant herein, all as in the preceding [39] subdivision of this Answer set forth; allege that the evidence presented to and considered by said Board was presented and considered under the circumstances hereinabove set forth and not otherwise; deny that said Board determined the validity of said claim to Mare Island, and allege that the facts in this behalf are as in the preceding subdivision of this Answer set forth and not otherwise; admit that said Board on October 23, 1855, filed a certified tran-

script of said case and of their proceedings and decision with the Clerk of this Honorable Court, but deny that said proceedings, or any of them, or that said decree, was valid, and allege the fact to be that the same were and each of them was null and void and of no effect, all as more particularly set forth in the preceding subdivision of this Answer.

Further answering the allegations of subdivision IV of the Bill, these defendants deny that pursuant to the terms of Sections 9 and 10 of the aforesaid Act of March 3, 1851 (9 Stats. 631), or otherwise, complainant herein, either by its District Attorney or otherwise, duly presented its petition to this Honorable Court praying a review of said decision and decree of said Board, or for a decision upon the validity of said claim to Mare Island, or that complainant herein, duly or otherwise, complied with the law or the requirements governing such petitions for review, but on the contrary allege the true facts to be as stated in the preceding subdivision of this Answer and not otherwise; deny that the aforesaid minute order of this Court of March 2, 1857, purporting to be for a decree confirming said decree of said Board was duly given or made, but on the contrary allege the fact to be that said minute order was made solely by reason of the facts and circumstances hereinbefore alleged, and allege that said minute order was and is null and void and not [40] binding upon these defendants, or any of them; deny that the aforesaid decree nunc

pro tunc was duly given or made, but on the contrary allege the fact to be that said decree was made solely by reason of the facts and circumstances hereinbefore alleged and allege that said decree was and is null and void and not binding upon these defendants, or any of them.

Further answering the allegations of Subdivision IV of the Bill these defendants admit and allege that these defendants claim, and each of them claims, under and as a successor to the complainant herein by virtue of a grant made by complainant to the State of California on September 28, 1850, of all of the lands described in the Bill, said lands then being swamp and overflowed lands within the State of California, all pursuant to the Act of September 28, 1850 (9 Stats. 519), all of said last-mentioned lands being within and subject to the provisions of said grant; allege that each of these defendants claims an interest in said lands as more particularly set forth in "Exhibit A" to this Answer; deny that these defendants, or any of them, or any of their predecessors in interest, are or were in privity with complainant herein in said appeal from said decision of said Board of Land Commissioners, but on the contrary allege the fact to be that complainant herein had no right or power or authority whatever to represent these defendants, or any of them, or any of their predecessors in interest (other than complainant itself) in said proceedings; deny that these defendants are, or that any of them is, bound by said nunc pro tunc decree,

but on the contrary allege the fact to be that none of these defendants is bound thereby; deny that any of the proceedings aforesaid in any way related to or included or involved or affected any of the lands described in the Bill and allege the fact to be that none of said proceedings in any [41] way related to or included or involved or affected any of said lands.

IV.

Answering the allegations of subdivision IV(a) of the Bill, as added by amendment thereto, these defendants deny that in July, 1877, the Surveyor General of California in compliance with the thirteenth section of the act entitled "An Act to ascertain and settle the private Land Claims in the State of California", approved March 3, .851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and in this connection allege the facts to be that in July, 1877, purporting to act pursuant to the provisions of an act entitled "An Act to expedite the settlement of titles to lands in the State of California" approved July 1, 1864 (13 Stats. 332), the United States Surveyor General of California appointed United States Deputy Surveyor James E. Freeman as special deputy to survey the claim for Mare Island although no final decree of confirmation had been made or entered; that pursuant to such appointment said James E. Freeman made what purported to be survey and plat of said Mare Island which were filed in the office of said Surveyor General of California in or about

the month of August, 1877; admit that said Surveyor General of California thereupon gave notice that the same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, the "Alta California", and one published near the land surveyed, to wit, the "Vallejo Evening Chronicle" published in the City of Vallejo, County of Solano, State of California, and allege the fact to be that the date of first publication in San Francisco was October 11, 1877; admit that said Surveyor General of California retained in his office for public inspection the [42] said survey and said plat until ninety days from the date the first publication in San Francisco had expired; deny that no objections were made to said survey and allege the fact to be that on the 14th day of July, 1879, a protest against said survey and said plat of Mare Island was filed in the office of said Surveyor General of California by Bernard T. Hanley, Esq., as attorney for owners; deny that said Surveyor General of California approved said survey and said plat or either of them and allege the fact to be that said Surveyor General of California expressly disapproved of the same because they improperly included a large quantity of land which was not a part of said Mare Island, the said lands so erroneously included being for the most part the very lands which are the subject of this litigation, said Surveyor General of California disapproving the inclusion of any of the lands involved in this

litigation as a part of said Mare Island; deny that copies of said survey and said plat were, or that a copy of either of them was, forwarded by said Surveyor General of California to the Commissioner of the General Land Office at Washington for his examination and approval at the expiration of said ninety days after the aforesaid date of first publication in San Francisco and allege the fact to be that at no time prior to August 7, 1879, was any copy of said plat or of said survey forwarded to said Commissioner of the General Land Office for his examination and approval; deny that thereafter the Commissioner of the General Land Office approved said survey or said plat but allege the fact to be that said Commissioner of the General Land Office has never approved said survey or said plat; allege that these defendants are without knowledge as to whether said Commissioner of the General Land Office caused the said survey or said plat to be filed in a jacket called the Mare Island Jacket in [43] the files of military reservations in the General Land Office; deny that thereafter and on September 22, 1905, or at any other time, the Commissioner of the General Land Office expressly or otherwise approved or used or acted upon said purported survey or said purported plat, and allege the fact to be that at no time has said Commissioner of the General Land Office ever expressly or otherwise approved or used or acted upon the said survey and the said plat, or either of them; deny that thereafter and on September 28, 1905, or at any other

time the Secretary of the Interior expressly or otherwise approved or concurred in any action of the Commissioner of the General Land Office in approving said survey or said plat or in using or acting upon the same, or that said Secretary of the Interior ever approved or used or acted upon said survey or said plat and allege the fact to be that the Secretary of the Interior has never approved said survey or said plat or used or acted upon them, or either of them; admit that some of the lands described in the Bill were erroneously included within the exterior limits of said survey, but deny that all of said lands were so included and allege the fact to be that a very large portion of the lands described in the Bill was never included within the exterior limits of said survey and allege the fact to be that such of said lands as were included within the exterior limits of said survey were erroneously included therein and that, because of said erroneous inclusion, said survey was never approved either by the United States Surveyor General of the State of California or by the Commissioner of the General Land Office or by the Secretary of the Interior, but was expressly disapproved by said United States Surveyor General; deny that any of the said lands described in the Bill was or is included within the [44] exterior limits of said pretended Spanish grant of Mare Island, and allege the fact to be that none of said lands was included within said grant,

V.

Answering the allegations of Subdivision V of the Bill, these defendants admit and allege that complainant acquired such title and interest in said Mare Island and in the lands described in the Bill as said Bissell and Aspinwall and as said Mary S. McArthur had, but deny that they, or any of them, ever had any title to or interest in said Mare Island, or in or to said lands described in the Bill, or in or to any part thereof; admit that complainant paid a valuable consideration to said Bissell and Aspinwall and McArthur of $83,491; admit that complainant received a deed purporting to convey said Mare Island and some of the lands described in the Bill from said Bissell and Aspinwall and McArthur on January 4, 1853, but allege that said deed conveyed no right or title or interest whatever in or to said lands, or any thereof, to complainant; admit that said deed was filed for record and recorded in the County Recorder's office of Solano County, California, on April 18, 1853, but deny that all of the lands described in the Bill now are or ever were situate in said County of Solano, State of California, but on the contrary allege the fact to be that a considerable portion of Sections 31, 32 and 33 of Township 4 North, Range 4 West, and of Sections 34, 35 and 36 of Township 4 North, Range 5 West, M. D. B. and M. are now and ever since a long time prior to January 1, 1853, have been situate in the County of Napa, State of California.

VI.

Answering the allegations of Subdivision VI of the Bill, these defendants admit that on November 6, 1850, the [45] President of the United States by executive order reserved from sale and for public purposes Mare Island; deny that said Mare Island so reserved ever included, or now includes, the lands described in the Bill, or any of said lands, and allege the fact to be that none of the said lands was ever reserved by the President of the United States, either by executive order or otherwise, for public or any other purposes or at all, and further allege the fact to be that none of said lands has at any time subsequently to September 28, 1850, been public land of the United States or subject to reservation by the United States, but that on the contrary, all of said lands were upon said last-mentioned date granted by the United States to the State of California and have ever since been owned by the State of California and its subsequent grantees.

VII.

Answering the allegations of Subdivision VII of the Bill, these defendants admit that on February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of Section 3 of the Act of August 3, 1852 (10 Stats. 104) selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as

President of the United States that the said lands Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said Island, and the harbors, waters and anchorages connected therein and necessary to the use of the same, as a site for the Navy Yard and Naval Depot provided for by said Act of Congress, but deny that within said lands are included the lands and premises, or any of the lands or premises, described in the Bill, and allege the fact to be that none of the lands described in the Bill was within the lands so selected [46] by said Secretary of the Navy.

Further answering the allegations of Subdivision VII of the Bill, these defendants admit that following the aforesaid selection, the Secretary of the Navy on February 9, 1853, recommended to the and premises selected by him as above stated be reserved for public uses and that on February 11, 1853, President Millard Fillmore approved said recommendation and made said reservation and that said reservation was communicated to the Secretary of the Interior and duly and properly recorded, but allege the fact to be that none of the lands described in the Bill was included within the lands so reserved.

Further answering the allegations of Subdivision VII of the Bill, these defendants admit that a copy of the aforesaid selection and recommendations of the Secretary of the Navy, together with the approval of the President of the United States, and his order making said reservation, is attached to

the Bill, and marked "Exhibit C", but allege the fact to be that said copy is incomplete in that said copy does not include the map or chart referred to therein; admit that from time to time the Congress of the United States has approved, ratified and confirmed said reservation of Mare Island and by various statutes has appropriated large sums to improve the lands comprised therein and authorized their improvement, but, as aforesaid, allege the fact to be that none of the land described in the Bill was or is included within the lands so reserved.

VIII.

Answering the allegations of Subdivision VIII of the Bill, these defendants deny that the lands and premises, [47] or any of the lands or premises, described in the Bill is or are included within the boundaries, or is or are a part of the lands or premises described in the grant from Juan B. Alvarado, Governor of California under the rule and occupation of Mexico, to Victor Castro, or that said lands or premises, or any thereof, were or was conveyed by said Juan B. Alvarado to said Victor Castro, but on the contrary allege the fact to be, as aforesaid, that said grant was fraudulent and void, and that no grant of any lands was ever made by said Juan B. Alvarado to said Victor Castro; deny that any confirmation of said grant was ever made by said Board of Land Commissioners to George W. P. Bissell and William H. Aspinwall, or to either of them, or otherwise or at all; deny

that said lands and premises, or any thereof, are or is included within the boundaries of, or are or is a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor, Mary S. McArthur, or from any of them, and in this connection allege the facts to be as hereinabove in this Answer set forth.

IX.

Answering the allegations of Subdivision IX of the Bill, as amended, these defendants deny that continuously since September 16, 1852, and up to and including the year 1880, or at any other time, or at all, complainant occupied the lands, or any of the lands, described in the Bill, by or through its Navy Department and officials or otherwise, or that complainant has used or improved the same, or any thereof, for military purposes in connection with the Naval Station, Navy Yard and premises of the United States on Mare Island, or otherwise or at all. [48]

Further answering said Subdivision IX of the Bill, as amended, these defendants allege the fact to be that complainant has at no time since September 28, 1850, had possession of or been entitled to possession of the said lands described in the Bill, or any thereof; deny that the alleged possession of complainant during the period from September 16, 1852, to and including the year 1880, was at all times or ever actual or open or adverse or exclusive or under claim of right or under title or under

claim or color of title, either that supplied by the aforesaid reservations or by the said deed of January 4, 1853, or by the said decision of the Board of Land Commissioners of May 8, 1855, or by said minute order of this Honorable Court given and made on March 2, 1857, or by said decree of this Honorable Court of April 15, 1930, by relation, or otherwise, or at all; admit that the lands of Mare Island, but deny that any of the lands described in the Bill, were, during the aforesaid period, improved for military and naval purposes by the construction of buildings and improvements thereon, and of signs warning trespassers that said premises were government property; deny that there was about the year 1873 or at any other time located upon the lands described in the Bill a dwelling house erected or maintained or occupied by or on behalf of complainant; deny that a road has ever been built thereon or has ever been used under the authority of complainant; deny that complainant has ever used the lands in question for gun range or for target practice; deny that complainant from time to time excavated or dug in said lands or used them for sand or gravel pits or as a source of supply for said sand or gravel either as complainant required for its use in connection with its use and occupancy of said Naval Reservation or otherwise or at all, and allege the fact to be that if [49] any of said things had been done by complainant, complainant was thereby a trespasser upon lands which did not belong to it but belonged to these defen-

dants and to their predecessors in interest; deny that all of the lands described in the Bill, or that any of them, were or was used by complainant in connection with the operations or activities of its naval or military forces or otherwise; allege that these defendants are without knowledge as to any of the following matters alleged in said Subdivision IX of the Bill, as amended—"In November, 1873, plaintiff went upon said land described in paragraph II and posted at frequent intervals thereon signs and notices that said property was Government property, and warning trespassers to keep off thereof", and allege the fact to be that if said things were done by complainant, as so alleged, complainant was thereby a trespasser upon lands which did not belong to it, but belonged to these defendants and to their predecessors in interest.

Further answering the allegations of said Subdivision IX of the Bill as amended, these defendants admit that on the 8th day of July, 1886, or thereabouts, the Circuit Court of the United States for the District of California in an action of ejectment therein pending and numbered 3140 in the records and files of said Court, in which plaintiff was not a party, and in which San Francisco Savings Union, a corporation, and others, were plaintiffs, and John Irwin, then Commandant of complainant's navy yard aforesaid, was defendant, gave and made a judgment in favor of said plaintiffs and against said defendant for the recovery by said plaintiffs from said defendant of the possession of said lands

in the Bill described, and in this connec- [50] tion allege that the facts with respect to said action are as hereinabove in Subdivision II of this Answer set forth and not otherwise; deny that complainant herein was not represented in said action, but on the contrary allege the fact to be that complainant herein was represented in said proceedings by its own counsel especially employed for that purpose and for the purpose of seeking to aid in the defense of said action, as in Subdivision II of this Answer alleged; admit that these defendants and their predecessors have entered upon and occupied that portion of said lands which is owned by them and described in "Exhibit A" to this Answer, but deny that said occupancy was or is in consequence of said judgment, and in this connection allege the fact to be that these defendants and their predecessors were in possession and occupation of said lands long prior to said judgment and that they continued in the possession and occupancy of said lands thereafter and continuously up to the present time; admit that these defendants have withheld possession of said lands from complainant, without complainant's consent, and in this connection allege, as aforesaid, that complainant is not and never has been since September 28, 1850, entitled to the possession of said lands or any thereof; deny that these defendants have no other entry or right of entry or possession of said lands, except after said judgment, but allege the fact to be that defendants and their predecessors (exclusive of complainant) have

had entry and right of entry and right of possession of and to all of said lands ever since September 28, 1850. [51]

X.

Answering the allegations of Subdivision X of the Bill, these defendants admit and allege that the lands described in the Bill were claimed by the State of California under and by virtue of the Act of September 28, 1850 (9 Stats. 519) commonly known as the "Swamp Land Act", by which the whole of those swamp and overflowed lands within the State of California made unfit thereby for cultivation, comprising part of the public domain of the United States of America on the date of passage of said Act and remaining unsold, were granted to the State of California; allege that said lands and all of said lands described in the Bill were of the character described in the aforesaid Act of September 28, 1850, and were at the date of said Act part of the public domain and unsold and by said Act passed to the State of California; admit and allege that said lands were surveyed in the year 1869 under the authority of the State of California and identified by said survey as Survey No. 569 and as containing 7413.48 acres in area, and that thereafter the State of California issued its patent conveying all of the lands included in said survey to George W. Pearson under date of April 7, 1874, and describing them according to said Survey No. 569.

XI.

Answering the allegations of Subdivision XI of the Bill, these defendants admit that they and each of them claim a right, title or interest in or to said lands described in the Bill, through and by virtue of mesne conveyances vesting in them the title of said George W. Pearson or some part or parcel thereof, and in this behalf allege that each of [52] these defendants claims the right, title or interest in and to said lands more particularly set forth in "Exhibit A" attached hereto; admit that these defendants claim, and each of them claims, such right, title or interest adversely to the complainant; deny that any of said claims is without right or foundation in law or in fact, but on the contrary allege the fact to be that each of said claims is of right and is founded both upon law and fact; allege that these defendants are without knowledge as to any of the following matters alleged in said Subdivision XI of the Bill—"That there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of this complaint, adverse to the complainant's ownership, and casting a cloud upon the complainant's title therein; that the claims of said persons are wholly without rights or merit in law or in fact".

XII.

Answering the allegations of Subdivision XII of the Bill, these defendants admit that on April 26, 1924, a patent numbered 937055 was issued to the

State of California by the United States under the provisions of said Act of September 28, 1850, known as the Swamp Land Act, which said patent included all of the lands described in subparagraph (B) of Subdivision II of the Bill which lie in Townships 3 and 4 North, Range 4 West, M. D. B. and M.; admit and allege that on June 5, 1896, a patent known as Swamp Land Patent No. 72 was issued to the State of California by the United States under the provisions of said Swamp Land Act, which said patent included all of fractional Section 1 of Township [53] 3 North, Range 5 West, M. D. B. and M., containing an estimated area of 177 acres described in subparagraph (B) of Subdivision II of the Bill; and admit and allege that on February 7, 1910, a patent known as Swamp Land Patent No. 152 was issued to the State of California by the United States under the provisions of said Swamp Land Act, which said patent includes all of the lands described in subparagraph (B) of Subdivision II of the Bill lying in Township 4 North, Range 5 West, M. D. B. and M.

Further answering the allegations of said Subdivision XII of the Bill, these defendants allege that each of the said patents is, and ever since the date of its issuance has been, in all respects valid and in full force and effect, and deny that said patents then were or now are, or that any of said patents then was or now is, either void, or of no force or effect, or of no validity, in so far as the same grant or convey or include or describe the lands, or any

of the lands mentioned in the Bill, either for the reasons set forth in said Subdivision XII of the Bill, or otherwise or at all; deny that said lands described in said patents ever were, or that any of said lands ever was, held in private ownership under or by virtue of the aforesaid grant from Mexico to said Victor Castro, either at the time of the passage and approval of said Swamp Land Act, or at any other time or at all; deny that said lands were not then a part of the public domain, but on the contrary allege that at the date of said Swamp Land Grant all of said lands described in the Bill were part of the public domain of the United States; deny that complainant has owned or occupied any of said lands at any time other than as a part of the public domain, and deny that [54] complainant has ever owned or occupied said lands, or any of them, as the successor in interest to said Victor Castro under said grant from the Government of Mexico; deny that any of said lands has ever been selected for or devoted to the public purposes of the United States and deny that any of said lands has ever been withdrawn from entry by private persons as alleged in Subdivisions VI and VII of the Bill, or otherwise (except as a result of the grant of said lands to the State of California under said Swamp Land Act, as aforesaid) either prior to the issuance of the aforesaid patents, or at any other time or at all.

XIII.

Answering the allegations of Subdivision XIII of the Bill, these defendants allege that they have no knowledge of any of the matters or things in said Subdivision alleged.

XIV.

Answering the allegations of Subdivision XIV of the Bill, these defendants deny that complainant is without adequate remedy in the premises at law, and deny that complainant is entitled to any remedy whatsoever in the premises.

As a second, separate and distinct defense in answer to the Bill, these defendants allege that this suit and the cause of action attempted to be stated in the Bill are, as to said Swamp Land Patent No. 72 dated June 5, 1896, from the United States of America to the State of California, referred to in Subdivision XII of the Bill, and as to all of the lands described in Subdivision II of the Bill lying in Township 3 North, Range 5 West, Mount Diablo Base and Meridian, and as to said Swamp Land Patent No. 152 dated February 7, [55] 1910, from the United States of America to the State of California, referred to in said Subdivision XII of the Bill, and as to all of the lands described in Subdivision II of the Bill lying in Township 4 North, Range 5 West, Mount Diablo Base and Meridian, forever barred by Section 8 of the Act of Congress, approved March 3, 1891, Chapter 561 (26 Stats. at p. 1099), and by Title 43, United States Code, Section 1166.

Wherefore, these defendants pray judgment as follows:

1. That complainant is not the owner of any of the real property described in "Exhibit A" attached to this Answer, or to any part thereof, and that complainant has no right or title or interest in or to said real property, or any part thereof.

2. That each of these defendants is the owner of the interest in said real property described in said "Exhibit A" set forth therein, and that each of said defendants is in and entitled to possession of such interest.

3. That the complainant be perpetually enjoined from asserting any claim or title whatsoever in or to said real property, or any thereof, adverse to these defendants.

4. That these defendants have such further or different relief as may be agreeable to equity and good conscience.

5. That these defendants have and recover their costs of suit herein incurred.

HENRY E. MONROE,
WARREN OLNEY, JR.,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
WARREN OLNEY, III,
Solicitors for Answering Defendants.
McCUTCHEN, OLNEY, MANNON & GREENE,
Of counsel. [56]

EXHIBIT A

[Printer's Note]: Here follows description of various parcels of lands with statement of ownership substantially as they appear in Exhibit "A" to the Judgment. [57]

[Endorsed]: Service of the within Answer and receipt of a copy thereof admitted this 14th day of February, 1936.

H. H. McPIKE,
U. S. Atty.
ESTHER B. PHILLIPS,
Asst. U. S. Atty.
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 14, 1936. [71]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANTS MARY W. STEWART, SEARS POINT TOLL-ROAD CO., A CORPORATION, AMERICAN TRUST COMPANY, A CORPORATION, BAY LAND COMPANY, A CORPORATION, FIELD AND TULE LAN DCOMPANY, A CORPORATION, AND WEST END LAND COMPANY, A CORPORATION, TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO.

Come now defendants Mary W. Stewart, Sears Point Toll-Road [72] Co., a corporation, American

Trust Company, a corporation, (sued herein as American Trust Co.), Bay Land Company, a corporation (sued herein as Bay Land Co.), Field and Tule Land Company, a corporation (sued herein as Field and Tule Land Co.), and West End Land Company, a corporation (sued herein as West End Land Co.), and, with leave of court first had and obtained, file the following amendment to their answer to complainant's amended bill of complaint on file herein and the Amendments thereto on file herein (all hereinafter for convenience referred to as the Bill), and admit, deny and allege as follows, to-wit:

THIRD DEFENSE

The Established Public Boundary of the Mare Island Navy Yard Reservation.

As a third, separate and distinct defense and answer to the Bill, these defendants allege as follows:

I.

That the Mare Island Navy Yard Reservation (hereinafter for convenience referred to as said Mare Island Reservation) is a naval reservation of the United States, and the territory thereof is territory of the United States subject to the exclusive jurisdiction, dominion and sovereignty of the United States and not to the jurisdiction, dominion or sovereignty of the State of California. That such exclusive jurisdiction, dominion and sovereignty were acquired by the United States as follows:

On November 6, 1850, and again on February 16, 1853, the President of the United States, by executive order, reserved Mare Island from sale and for public use as a navy yard [73] and naval depot. In addition, in 1853 the United States purchased the claims of certain private persons to said Mare Island and this purchase was consented to by the State of California by acts of her Legislature adopted April 27, 1852 (Cal. Stats. 1852, p. 149) and May 11, 1854 (Cal. Stats. 1854, p. 161). By the act of the Legislature of the State of California of March 2, 1897 (Cal. Stats. 1897, p. 51) the State of California expressly ceded exclusive jurisdiction to the United States of all lands within said State held, occupied or reserved by the United States for military purposes or defense, which cession included the lands then occupied by the United States as said Mare Island Reservation, said act requiring that a sufficient description of such lands be filed in the proper office of record in the counties in which the same were situated, and the United States, pursuant to said act, filed and recorded in the office of the County Recorder of the County of Solano (that being the county within the exterior boundaries of which said Mare Island Reservation is situate) a sufficient description of said Mare Island Reservation, said filing being a map showing the boundaries of said Mare Island Reservation, which map was recorded November 10, 1913, in Book 5 of Maps, page 4, Solano County Records.

II.

That the lands described in Subdivision II of the Bill are the lands embraced within that certain state segregation survey known as Swamp and Overflowed Land Survey No. 569 (hereinafter for convenience referred to as Survey 569).

That beginning in the year 1890 and consistently ever since (except for the filing of this action on April 22, 1930) the United States has recognized that the northwesterly [74] boundary of said Mare Island Reservation did not extend beyond or to the north of the southeasterly boundary of said Survey 569. Said southeasterly boundary of said Survey 569 has been established, recognized and acquiesced in by the United States as the line beyond which said Mare Island Reservation did not extend, and at no time since 1890 has the United States asserted or attempted to assert or exercise jurisdiction, dominion or sovereignty over any of the lands within said Survey 569 as a part of said Mare Island Reservation. On the contrary, ever since 1890 the State of California has, with the knowledge of and without objection by the United States, consistently asserted and exercised its jurisdiction over all of said lands as lands subject to its jurisdiction, dominion and sovereignty and as lands which were not within or a part of said Mare Island Reservation.

That said southeasterly boundary line of said Survey 569 became the established, recognized and accepted public boundary line limiting the extent of said Mare Island Reservation in the manner next hereinafter set forth.

III.

Mare Island is now and at all times has been a body of high land rising out of the waters of San Pablo Bay, being surrounded, except at its extreme northwesterly end, by the waters of said Bay and of Carquinez and Mare Island Straits. Said Island extends lengthwise in a northwesterly and southeasterly direction a total distance of about 2½ miles. At its northwesterly end it was long prior and long subsequently to 1850 connected by a narrow neck of marsh, in places less than 600 feet wide, with a great area of swamp and overflowed lands [75] extending to the north and west seven or eight miles. Prior to 1850 and for many years thereafter said narrow neck of marsh was submerged and completely covered with water at least at times of extreme high tide. The said great area of swamp and overflowed lands to the north and west was also, at extreme high tide, largely covered with water, and except for a sand ridge along the shore of San Pablo Bay washed up by the waters of said Bay, was swampy and marshy and in good part subject to overflow and was entirely unfit for cultivation or use of any kind without reclamation.

That most of said swamp and overflowed lands to the north and west lay within the boundaries of said Survey 569, which was surveyed on behalf of the State of California in June of 1869. The swamp and overflowed lands lying between and southeasterly boundary of said Survey 569 and said Mare Island, including said narrow neck of marsh, were

embraced within that certain state segregation survey known as Swamp and Overflowed Land Survey No. 34, which survey is hereinafter for convenience referred to as Survey 34.

IV.

That in the year 1853 the United States took possession of Mare Island and commenced the establishment of a navy yard and navy depot thereon and has ever since occupied said Island as a reservation for naval purposes, with the consent of the State of California as hereinbefore set forth, and has exercised exclusive jurisdiction, dominion and authority over said Island and said naval reservation. [76]

V.

That on September 28, 1850, the United States, by Act of Congress known as the Swamp Land Act, granted to the State of California all unsold swamp and overflowed lands unfit for cultivation lying within said State. All of the lands within said Survey 569 were lands of the character described in said Swamp Land Act and, pursuant to said Act, passed to the State of California by said grant.

On or about the 7th day of April, 1874, the State of California having theretofore and in the year 1869 sold the lands in Survey 569 to one Jacob C. Hinckley, issued its patents for said lands to one John W. Pearson as assignee of said Hinckley, from whom these defendants acquired by mesne conveyances those portions of said Survey 569

owned by them and more particularly described in "Exhibit A" to the Answer of these defendants.

VI.

When the United States first took possession of said Mare Island as a naval reservation as aforesaid, it did not occupy any of the lands within said Survey 34 nor any of the lands within said Survey 569, although almost from the outset it used nearby portions of Survey 34 as a dumping area and also as a place from which it procured sand for use at said Navy Yard and on a few occasions placed targets on said Survey 34 for use in target practice. The United States has never at any time used any [77] portion of the lands lying within said Survey 569 for any purpose whatsoever in connection with said Mare Island Reservation.

Prior to September 13, 1883, one John Irwin, as the then commandant of Mare Island Navy Yard, claimed and asserted the right to possession of said Survey 569 on behalf of the United States and excluded therefrom the predecessors in interest of these defendants. On September 13, 1883, said predecessors in interest of these defendants brought an action in ejectment against said John Irwin for the recovery of said Survey 569, all as more particularly set forth in subparagraph (a) of Subdivision II of the first defense in the Answer of these defendants. As stated in subparagraph (a), said action was defended at the expense and on behalf of the

United States and upon the ground that the lands of which said commandant had taken possession were a part of Mare Island and were owned by the United States as a part of said Mare Island Reservation. On July 8, 1886, the United States Circuit Court, Ninth Judicial District for the District of California, gave judgment in said action in favor of the plaintiffs therein and against said commandant, expressly finding and holding that the lands embraced in said Survey 569 were not a part of Mare Island and were not owned by the United States as a part of said Mare Island Reservation or otherwise, but, on the contrary, the plaintiffs in said action were the owners thereof as the successors in interest of the State of California under said Swamp Land Grant. The defendant in said action, at the expense and on behalf of the United States, prosecuted an appeal from said judgment to the Supreme Court of the United States, and on February 3, 1890, said judgment was affirmed by said court. Upon the affirmance of said judgment the plaintiffs in said action went into [78] possession of said land and from and after that time until the commencement of this action said judgment was and has been accepted by the United States, and by the State of California, and by all persons interested therein as conclusively establishing that all of the lands in said Survey 569 were not a part of Mare Island and were not owned by the United States.

Since the affirmance of said judgment the southeasterly boundary line of said Survey 569 has consistently been recognized by the United States as the public boundary line between said Mare Island Reservation and the territory subject to the jurisdiction, dominion and sovereignty of the State of California, and the State of California has ever since the affirmance of said judgment consistently exercised jurisdiction, dominion and sovereignty over all of the lands lying to the north and west of said boundary line, including all of the lands embraced in said Survey 569, all as evidenced by the following acts among others:

(a) The State of California has consistently taxed the real and personal property in said Survey 569; has included the lands therein in election districts and voting precincts; has exercised through its courts civil and criminal jurisdiction within said Survey 569; and has, through its subordinate instrumentalities, granted franchises for toll roads across said lands. In addition thereto, the predecessors in interest of these defendants have reclaimed large portions of the lands within said Survey 569, and for more than thirty years prior to the filing of this action have been in the undisturbed possession and occupancy of said lands and have cultivated and lived on the same.

The United States, on the other hand, has not attempted [79] to take possession of any of the lands to the north and west of said boundary line,

either as a part of said Mare Island Reservation or otherwise, nor has it attempted to exercise jurisdiction, dominion and sovereignty over any of said lands, as it has consistently done with respect to the lands within said Mare Island Reservation, but has permitted, without objection, the reclamation and cultivation of the lands to the north and west of said line by these defendants and their predecessors in interest and the making of improvements thereon and the construction and use of toll roads, pipe lines and electric power lines across the same.

(b) In the year 1897 the then commandant of Mare Island Navy Yard and the then predecessors in interest of these defendants jointly caused a survey to be made for the purpose of determining the location of the southeasterly boundary line of said Survey 569 as the public boundary line beyond which the said Mare Island Reservation did not extend, and upon the determination of such boundary line the then predecessors in interest of these defendants, to the knowledge and without objection by the United States, constructed a levee on said line, as so determined, for the purpose of reclaiming the land to the north thereof. Subsequently it was discovered that the boundary line as so determined was erroneous and that the true southeasterly boundary line of said Survey 569 lay to the northwest of said line as theretofore established; whereupon, said boundary line was correctly located and thereafter and in December, 1914, the United States, with the

acquiescence of the predecessors in interest of these defendants, erected and has ever since maintained a substantial post and wire fence along the true southeasterly boundary line of said Survey 569 as a boundary fence marking [80] and indicating the line beyond which said Mare Island Reservation did not extend.

(c) That as hereinbefore stated, on November 10, 1913, pursuant to said act of the Legislature of the State of California of 1897 ceding to the United States the exclusive jurisdiction over all lands within the State of California held, occupied or reserved by the United States for military purposes or defense, the United States filed and recorded in the office of the County Recorder of the County of Solano a map showing the boundaries of said Mare Island Reservation and upon said map the northwesterly boundary line of said Reservation is shown as the southeasterly boundary line of said Survey 569, as correctly located as in paragraph (b) heretofore stated.

(d) On June 5, 1896, the United States patented to the State of California all those portions of said Survey 569 lying in Township 3 North, Range 5 West, M. D. B. & M., and on February 7, 1910, the United States patented to the State of California all those portions of Survey 569 lying in Township 4 North, Range 5 West, M. D. B. & M., said patents being the patents referred to in the Bill herein as Swamp Land Patents Nos. 72 and 152 respectively.

The lands so patented are the portions of said Survey 569 most remote from said Mare Island, the nearest point of the same being approximately five miles from Mare Island.

Thereafter application was made for the issuance of a patent to the State of California of the lands embraced within said Survey 569 lying between the lands patented as above set forth and the southeasterly boundary line of said Survey 569, said lands being those lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. The Navy Department having [81] theretofore indicated that the United States claimed said lands as a part of said Mare Island Reservation, the Secretary of the Interior under date of October 18, 1912, addressed a letter to the Secretary of the Navy requesting of him such data as might be in the latter's possession relative to the limits of the lands embraced in Mare Island to the end that the matter of segregating the swamp and overflowed lands from said Mare Island might be considered. Under date of February 1, 1913, the Acting Secretary of the Navy addressed a reply to the Secretary of the Interior calling the latter's attention to the judgment in the action of ejectment against John Irwin hereinbefore mentioned, which held that the lands embraced within said Survey 569 were not a part of Mare Island and with said letter said Acting Secretary of the Navy forwarded to the Secretary of the Interior a plan showing the then limits of said Mare Island and

showing that the northwesterly boundary line of said Mare Island Reservation did not extend beyond or to the north or west of said southeasterly boundary line of said Survey 569.

Thereafter the Department of the Interior directed that appropriate surveys be made of said Townships 3 and 4 North, Range 4 West, M. D. B. & M., for the purpose of segregating the swamp and overflowed lands therein granted to the State of California by said Swamp Land Act and directed that such survey should be limited to the lands in said townships lying to the north and west of said southeasterly boundary line of said Survey 569 as established by the fence erected upon said boundary line by the United States as hereinbefore set forth. Such surveys were made and approved, and the Secretary of the Navy having expressed the view in a letter to [82] the Secretary of the Interior, under date of June 4, 1923, that all of the lands lying within said Survey 569 had been lost to the United States by reason of the judgment in said ejectment suit against John Irwin hereinbefore referred to, the Department of the Interior ordered all of the lands embraced within said Survey 569 lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. to be patented to the State of California, and pursuant to said instructions said lands were pat-

ented to the State of California by patent dated April 26, 1924, and numbered 937055.

HENRY E. MONROE,
WARREN OLNEY, JR.,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
WARREN OLNEY, III.
Solicitors for answering defendants.

McCUTCHEN, OLNEY,
MANNON & GREENE,
Of counsel.

[Endorsed]: Filed May 25, 1937. [83]

[Title of District Court and Cause.]

SECOND AMENDMENT TO ANSWER OF DEFENDANTS MARY W. STEWART, SEARS POINT TOLL-ROAD CO., A CORPORATION, AMERICAN TRUST COMPANY, A CORPORATION, BAY LAND COMPANY, A CORPORATION, FIELD AND TULE LAND COMPANY, A CORPORATION, AND WEST END LAND COMPANY, A CORPORATION, TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO.

Come now the defendants above named and with leave of Court first had and obtained file the follow-

ing amendment to their answer to complainant's amended Bill of Complaint and the amendments thereto, all hereinafter for convenience referred to as the Bill, and admit, deny and allege as follows, to-wit:

FOURTH DEFENSE

Equitable Estoppel.

For a fourth, separate and distinct defense and answer to the Bill these defendants allege as follows:

I.

Mare Island, referred to in the Bill herein, is and at all times has been a body of high land rising out of the waters of San Pablo Bay and surrounded, except at its extreme northwesterly end, by the waters of said Bay and of Carquinez and Mare Island Straits. It extends lengthwise in a northwesterly and [84] southeasterly direction a total distance of about two and one-half miles and contains some 900 acres, more or less. In 1850 and prior thereto and for many years thereafter it was connected by a narrow neck of marsh less than 600 feet wide with a great area of swamp and overflowed lands extending to the north and west seven or eight miles and containing some 7,000 acres, more or less. In 1850 and prior thereto and for many years thereafter said narrow neck of marsh land was submerged and completely covered with water at least at times of extreme high tide. The said area of swamp and overflowed lands to the

north and west was also at extreme high tide largely covered with water and, except for a sand ridge along the shore of San Pablo Bay washed up by the waters of said Bay, was swampy and marshy and subject to overflow and entirely unfit for cultivation or use of any kind without reclamation.

That most of said swamp and overflowed lands to the north and west lie within the boundaries of that certain State segregation survey known as Swamp and Overflow Land Survey No. 569, made on behalf of the State of California in June of 1869. The lands included within said survey are hereinafter referred to as Survey 569. The lands lying between the southeasterly boundary of said Survey 569 and Mare Island, including said narrow neck of marsh hereinbefore mentioned, are embraced within that certain State segregation survey known as Swamp and Overflow Land Survey No. 34, which lands are hereinafter referred to as Survey 34.

II.

On September 28, 1850, the United States, by Act of Congress known as the Swamp Land Act, granted to the State of [85] California all unsold swamp and overflowed lands unfit for cultivation lying within said State. All of the lands within said Survey 569 were of the character of the lands so granted by said Act.

On or about the 7th day of April, 1874, the State of California, having heretofore and in the year 1869 sold the lands in Survey 569 to one Jacob C.

Hinckley, issued its patents for said land to one John W. Pearson, as assignee of said Hinckley. Thereafter these defendants by mesne conveyance acquired from said Pearson those portions of said Survey 569 owned by them and more particularly described in Exhibit A to their answer.

III.

In 1853 certain private parties, to-wit: George W. P. Bissell, William H. Aspinwall and Mary S. McArthur, claimed to be the owners of Mare Island as the successors in interest of one Victor Castro, to whom they asserted the Government of Mexico had made a grant of said Island in the year 1841.

In said year 1853 the United States purchased from said Bissell, Aspinwall and McArthur all of their right, title and interest in and to Mare Island and thereupon, as alleged in paragraphs I and IV of the third defense of these defendants as set forth in the amendment heretofore made to their answer, took possession of Mare Island and established thereon and has ever since maintained a navy station or naval yard.

When the United States first took possession of said Mare Island as aforesaid, it did not occupy any part either of said Survey 34 or said Survey 569, and while thereafter it occupied and used portions of Survey 34 adjoining Mare Island, it has never at any time used any portion of said Survey 569 and, [86] except as hereinafter set forth in subdivision V hereof, has not had possession or at-

tempted to take possession of any portion of said survey.

IV.

On or about the 3rd day of January, 1883, one D. W. Bouldin and one A. P. Moore brought an action in ejectment against the then commandant of the Mare Island Navy Yard, one Thomas S. Phelps, seeking to recover possession of Mare Island, claiming that they were the owners of said Island by virtue of the asserted grant of the same hereinbefore mentioned by the Mexican Government to Victor Castro, asserting in that behalf that they and not said Bissell, Aspinwall and McArthur were the successors in interest of said Castro. As alleged in subparagraph (a) of subdivision II of the first defense in the answer of these defendants, said action was defended by and at the expense of the United States, which set up by way of defense to said action that the purported grant to said Victor Castro, hereinbefore mentioned, under which said Bissell, Aspinwall and McArthur had claimed title to said Island and under which the plaintiffs in said ejectment suit, said Bouldin and Moore, were then claiming title, was in fact fraudulent and void and that the instrument purporting to constitute and evidence said grant had in fact not been made until 1850 and after the Mexican sovereignty of California had ceased. Upon the trial of said action said defense was sustained and it was held that said purported grant to Victor Castro was in fact fraudulent and void and that the instrument pur-

porting to constitute and evidence said grant had not been made until 1850. [87]

V.

Shortly prior to September 13, 1883, the then commandant of Mare Island Navy Yard, one John Irwin, asserted the right as such commandant to the possession of said Survey 569 as being property of the United States and excluded therefrom the predecessors in interest of these defendants. Thereupon and on September 13, 1883, said predecessors in interest of these defendants brought an action in ejectment against said Irwin for the recovery of said Survey 569, all as more particularly set forth in sub-paragraph (b) of subdivision II of the first defense in the answer of these defendants. As there stated, said action was defended at the expense and on behalf of the United States and upon the ground that the lands of which said commandant had taken possession were a part of Mare Island and were owned by the United States. On July 8, 1886, the United States Circuit Court, Ninth Judicial District for the District of California, gave judgment in said action in favor of the plaintiffs therein and against said commandant, expressly finding and holding that the lands embraced in said Survey 569 were not a part of Mare Island and were not owned by the United States, but on the contrary the plaintiffs in said action were the owners thereof as the successors in interest of the State of California, as the grantee of the United States under the grant

made by said Swamp Land Act. The United States, in the name of said Irwin but at its own expense and on its own behalf, prosecuted an appeal from said judgment to the Supreme Court of the United States and on February 3, 1890 said judgment was affirmed by said court.

VI.

From the affirmance of said judgment until the commence- [88] ment of this action said judgment was and has been accepted by the United States and by the State of California and by all persons interested in said lands as conclusively establishing that none of said Survey 569 was owned by the United States, and until the commencement of this action on the 22nd day of April, 1930, the United States asserted no claim to any right or interest in said lands.

VII.

Following the affirmance of said judgment one L. E. Cross purchased for a valuable consideration the lands included in said Survey 569 and thereupon took possession of the same and in the year 1896 commenced the reclamation of the portion of said Survey 569 nearest Mare Island by the construction of extensive levees and drainage works. Preliminary to the construction of said levees and drainage works the then commandant of the Mare Island Navy Yard and said Cross jointly caused a survey to be made for the purpose of determining the southeasterly boundary line of said Survey 569

in order that said Cross might construct a levee along said line and such levee was thereupon constructed by said Cross. Said levees and drainage works were completed by said Cross on or before the year 1899 at an expense of many thousands of dollars and said Cross thereupon built roads and erected farm houses and other farm buildings on said Survey and commenced the farming and cultivation of a large part of the same, and such farming and cultivation by said Cross and his successors in interest has continued until the present time.

That portions of said Survey not cultivated were, following the affirmance of said judgment, improved at very considerable [89] expense by certain of these defendants or their predecessors in interest as wild duck preserves by the construction of levees, the making of ponds and the construction of roads and buildings.

That in 1926 and subsequent to the issuance by the United States of patents to the State of California for all of said Survey 569, the defendant Sears Point Toll Road Co. constructed a public toll road across said Survey 569 at an expense likewise in excess of many thousands of dollars.

That ever since the predecessors in interest of these defendants took possession of said lands following the affirmance of said judgment against said Irwin, they and their successors in interest have had the open, visible, exclusive and undisturbed possession of said Survey 569.

VIII.

Following the affirmance on February 3, 1890, of said judgment against said Irwin, the United States on June 5, 1896, patented to the State of California all those portions of said Survey 569 lying in Township 3 North, Range 5 West, M. D. B. & M., and on February 7, 1910, patented to the State of California all those portions of Survey 569 lying in Township 4 North, Range 5 West, M. D. B. & M., said patents being the patents referred to in the Bill herein as Swamp Land Patents Nos. 72 and 152, respectively. The lands so patented are the portions of said Survey 569 most remote from said Mare Island, the nearest point of the same being approximately five miles therefrom.

Thereafter application was made for the issuance of a patent to the State of California for the balance of said Survey 569, to-wit: those portions of said Survey lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. Upon said application [90] being made, the Secretary of the Interior, under date of October 18, 1912, addressed a letter to the Secretary of the Navy requesting of him such data as might be in the latter's possession relative to the limits of the lands embraced in Mare Island, to the end that the matter of segregating from Mare Island swamp and overflowed lands granted to the State of California might be considered. Under date of February 1, 1913, the Acting Secretary of the Navy replied by letter to the Secretary of the Interior calling attention to the judg-

ment in the action of ejectment against John Irwin hereinbefore mentioned, holding that the lands embraced within said Survey 569 were not a part of Mare Island, and with said letter forwarded to the Secretary of the Interior a map or plat showing the limits of Mare Island and showing as the northwesterly boundary line thereof the southeasterly boundary line of said Survey 569.

Thereafter and on November 10, 1913, pursuant to an Act of the Legislature of the State of California passed in 1897, ceding to the United States the exclusive jurisdiction of all lands within the State of California held, occupied or reserved by the United States for military purposes or defense, the United States filed and recorded in the office of the County Recorder of the County of Solano a map showing the boundaries of said Mare Island Reservation and upon said map the northwesterly boundary line of said Reservation is shown as the southeasterly boundary line of said Survey 569.

Thereafter the Department of the Interior directed that appropriate surveys be made of said Townships 3 and 4 North, Range 4 West, M. D. B. & M., for the purpose of segregating the swamp and overflowed lands therein granted to the State of California by said Swamp Land Act, and directed that such surveys [91] should be limited to the lands in said townships lying to the north and west of said southeasterly boundary line of said Survey 569. Such surveys were made and approved and

the Secretary of the Navy having been again consulted by the Secretary of the Interior as to lands claimed by the United States and being advised by the latter by letter under date of June 4, 1923, that all of the lands lying within said Survey 569 had been lost to the United States by reason of the judgment in said ejectment action, the Secretary of the Interior ordered all of the lands within said Survey 569 not theretofore patented to the State, to-wit: the lands in said Survey lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M., to be patented to the State of California, and pursuant to said order said lands were by the United States patented to the State of California by the patent referred to in the Bill herein dated April 26, 1924, and numbered 937055.

IX.

Each of these defendants prior to the commencement of this action purchased for valuable consideration from the successors in interest of the State of California the land alleged in the answer of these defendants to be owned by him, her or it, respectively, doing so subsequently to the issuance by the United States of its patents to the State of California for said land and in reliance upon said patents.

X.

That by reason of the foregoing facts the United States is estopped in equity and good conscience from asserting as against these defendants that any

part of said Survey 569 is [92] a part of Mare Island or that it has any right or title thereto.

HENRY E. MONROE,
WARREN OLNEY, JR.,
J. M. MANNON, JR.
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
WARREN OLNEY, III,
Solicitors for answering defendants.
McCUTCHEN, OLNEY, MANNON & GREENE,
Of counsel.

[Endorsed]: Filed Jun. 15, 1937. [93]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JAMES IRVINE TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO.

Comes now James Irvine, one of the defendants named in the above entitled action, and answering complainant's Amended Bill of Complaint on file herein and the Amendments thereto on file herein, (all hereinafter for convenience referred to as the Bill), admits, denies and alleges as follows, to-wit:

[94]

I.

Answering the allegations of Subdivision II of the Bill, this defendant denies that complainant is the owner of, or at any time subsequently to September 28, 1850, ever was the owner of, the lands or any of the lands described in said Subdivision II of the Bill; denies that complainant has ever occupied said lands or any thereof, either as a part of the Mare Island Navy Yard Reservation, or for public or military or naval purposes, or otherwise or at all; and denies that complainant has ever been in the possession of said lands or any thereof, or that it is, or at any time since September 28, 1850, ever was, entitled to the possession of said lands or any thereof.

Further answering the allegations of said Subdivision II of the Bill, this defendant alleges the fact to be that he is the owner of a portion of or an interest in the said lands described in the Bill, his ownership and interest being those more particularly set forth in "Exhibit A" attached hereto and by this reference hereby made a part of this answer; that the lands of this defendant described in said "Exhibit A" are shown in color upon the plat attached hereto as "Exhibit B" and hereby made a part of this answer; that the lands described in said "Exhibit A" have for more than fifty years last past been in the possession of this defendant, and of his respective predecessors in interest (exclusive of complainant); that this defendant and his said predecessors were entitled to the possession

of said lands during all of said period; and that said possession of said lands by this defendant and his respective predecessors in interest has at all times been open, notorious, under claim of right and under color of title, and adverse to complainant and to the whole world. [95]

II.

Answering the allegations of Subdivision III of the Bill, this defendant denies that by an instrument dated May 2, 1841, or otherwise, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, or by any other person, a grant was made by the Government of Mexico to Victor Castro of the lands described in the Bill, or of any of said lands, or of any lands at all; denies that any of the lands described in the Bill was ever granted by the Mexican Government to any person whomsoever; denies that "Exhibit A" to the Bill is, and alleges that it is not, a copy of the said grant in the Bill alleged, or of any grant made by the Government of Mexico; denies that there was ever any grant made by the Government of Mexico to Victor Castro which was filed for record in the office of the County Recorder of and for Sonoma County, California, or in any other county or place whatsoever, either on July 28, 1852, or at any other time, and alleges that no such grant was ever made; denies that any grant by the Mexican Government of any of the said lands described in the Bill was ever filed for record in the office of said

County Recorder of Sonoma County, California, or in any other county or place whatsoever, and alleges that no such grant was ever so filed; denies that said Victor Castro ever had any right or title to said above-mentioned lands, or any of them, and alleges that said Victor Castro never had any right or title in or to any of said lands; denies that George W. P. Bissell and William H. Aspinwall, or either of them, ever acquired any right or title thereto, from Victor Castro, or otherwise, or that they or either of them ever had any [96] right or title in or to said lands or to any thereof, and alleges that neither of them ever had any such right or title; denies that said Bissell and Aspinwall, or either of them, or anyone ever filed in the office of the Board of Land Commissioners empowered to ascertain and settle private land claims in the State of California, either on August 31, 1852, or at any other time, their or any petition seeking the confirmation to them of the lands or any of the lands described in the Bill, and alleges that no such petition was ever so filed; denies that any proceedings were ever had before said Board of Land Commissioners with respect to said above-mentioned lands, or any of them, or that any decree was ever given or made or entered by said Board confirming to anyone the said lands or any thereof, and alleges that no such proceedings were ever had and that no such decree was ever given or made or entered.

Further answering the allegations of said Subdivision III of the Bill, and also the allegations of the subsequent subdivisions thereof, this defendant alleges the fact to be that none of the lands described in the Bill is now or ever was a part of Mare Island, and in this connection more particularly alleges that a great part of the lands owned by this defendant and described in "Exhibit A" to this answer lies to the north and east of Dutchman's Slough, which is a navigable slough, and in most places of considerable width, whereas Mare Island lies far to the south and east of said Dutchman's Slough, and is entirely cut off from said part of said lands of this defendant by said Dutchman's Slough, and that said lands are not now nor have [97] they, or any of them, ever been contiguous to said Mare Island, or any part thereof, but, as aforesaid, are and always have been cut off therefrom by said Dutchman's Slough; alleges that none of said lands described in the Bill was ever included or involved in, or affected by, any proceedings whatever taken or had for the confirmation of any grant or alleged grant by the Mexican Government to Victor Castro of said Mare Island, or of any other grant or alleged grant by said Mexican Government.

Further answering the allegations of said Subdivision III of the Bill and also the allegations of the subsequent subdivisions thereof, this defendant alleges the fact to be that Victor Castro claimed that Mare Island was granted to him on or about

May 20, 1841, by the Government of Mexico, acting through Juan B. Alvarado, Constitutional Governor of the Department of California; that the Mare Island so claimed by said Victor Castro did not include the lands or any of the lands described in the Bill; that in fact no such grant as claimed was ever made by said Juan B. Alvarado or by the Mexican Government to said Victor Castro, or to any one else, and that the pretended grant under which said Victor Castro claimed was in fact executed by said Alvarado, if executed by him at all, long after the acquisition of California by the United States and subsequent to the time when said Alvarado ceased to be such Governor, and was fraudulently antedated May 20, 1841; that said Bissell and Aspinwall, claiming to have succeeded to the rights and title of said Victor Castro to Mare Island under said grant, filed with said Board of Land Commissioners [98] on or about August 31, 1852, a petition against the complainant herein seeking the confirmation to the said Bissell and Aspinwall of said Mare Island; that before any proceedings were had upon said petition and before any evidence was taken thereon and on or about the 4th day of January, 1853, said Bissell and Aspinwall, and one Mary S. McArthur, sold and conveyed to the complainant herein (i.e., to the defendant in said proceedings before said Board of Land Commissioners) all of their right and title under said alleged grant and in and to said Mare

Island, but that none of the lands owned by this defendant and described in "Exhibit A" to this answer was included, or intended to be included, in said conveyance; that thereupon complainant herein became the owner and in control of both sides of said proceedings and was and thereafter at all times continued to be the dominus litis upon both sides thereof; that thereafter complainant permitted certain proceedings to be had before said Board and on the 8th day of May, 1855, permitted said Board to make and file a decree in said proceedings purporting to confirm said claim to Mare Island to said Bissell and Aspinwall, that said decree was and is null and void and of no effect.

That thereafter and on the 23rd day of October, 1855, complainant caused and permitted to be filed in this Honorable Court a petition for a review of said decision and decree of said Board, not for the purpose of defending or establishing any right, title or interest as against said claimants, Bissell and Aspinwall, but solely for the purpose of obtaining a judgment and decree to be used against [99] third persons, and caused and permitted said matter to be submitted to this Honorable Court; that thereafter, without any hearing by this Honorable Court and without its considering the transcript of the aforesaid proceedings before said Board of Land Commissioners, which had theretofore been filed with this Honorable Court, and without considering or adjudicating the merits of the matter and solely

by reason of the consent of the complainant herein, this Honorable Court made a minute order on March 2, 1857, purporting to be for a decree confirming said decree of said Board; that there were no further steps or proceedings taken in said matter by complainant or by said ostensible claimants (other than an ineffectual appeal to the United States Supreme Court which was dismissed at the direction of the Attorney General of the United States) nor was there ever any decree made or entered therein, either pursuant to said last-mentioned minute order or otherwise, until 73 years thereafter, when, only 7 days before the filing of the Bill herein, and with the bringing of this suit directly in view and for the purpose of adversely affecting the rights of the defendants in this suit (complainant claiming that the lands described in the Bill herein were and are a part of Mare Island) and without giving this defendant any notice or opportunity to be heard and wholly ex parte, claimant requested and caused this Honorable Court on April 15, 1930, to make and sign a decree nunc pro tunc as of March 2, 1857, purporting to confirm the said decree of said Board of Land Commissioners; that complainant procured said decree nunc pro tunc for the purpose of adversely affecting the rights of the defendants [100] in this suit notwithstanding that, subsequently to the making of said minute order of March 2, 1857, the following proceedings had been had and the following things had occurred:

(a) On or about the 3rd day of January, 1883, an action of ejectment was brought in the Superior Court of the State of California in and for the County of Solano by D. W. Bouldin and A. P. Moore against Thomas S. Phelps, who was then the Commandant of the Mare Island Navy Yard and in possession of Mare Island, to recover the possession of said Mare Island; that thereafter and on the 14th day of January, 1883, said action was removed by said defendant Phelps to the United States Circuit Court, Ninth Judicial Circuit, for the District of California; that the plaintiffs in said action claimed title to said Mare Island under the aforesaid Mexican grant from Juan B. Alvarado to Victor Castro and under mesne conveyances from said Victor Castro, which conveyances were claimed to have been made prior to the alleged conveyance from Victor Castro under which said Bissell and Aspinwall claimed; that defendant Phelps was represented in said action by S. G. Hilborn, the United States District Attorney for the District of California, and, in addition thereto, the Attorney General of the United States appointed Judge A. L. Rhodes as a special assistant attorney of the United States to appear in said case on behalf of complainant and to assist in the defense of said action, and said counsel controlled and conducted the defense of said [101] action; that the only right, title

or interest in or to said lands set up by defendant Phelps in defense of said action was the title to the aforesaid lands claimed by complainant herein, said defendant and said counsel expressly disclaiming that said defendant had any other right, title or interest in or to said lands or any part thereof; that said defendant and said counsel asserted and produced evidence showing that said Mexican grant from said Juan B. Alvarado to said Victor Castro of said Mare Island was in fact fraudulent and void and was not made until 1850 and long after the Mexican sovereignty of California had ceased, and that said grant was fraudulently antedated to May 20, 1841; that said cause was tried before Circuit Judge Lorenzo Sawyer and District Judge Ogden Hoffman, who found and held that said Mexican grant of Mare Island was in fact fraudulent and void; that the court's opinion in said cause is reported in full in 30 Fed. 547.

(b) Prior to the 13th day of September, 1883, John Irwin, as commandant of said Mare Island Navy Yard, claimed that the lands described in the Bill were a part of Mare Island and as a result thereof and on said last-mentioned date an action in ejectment was brought in the Superior Court of the State of California in and for the County of Solano by The San Francisco Savings Union, The Bank of California and George A. Nourse, the owners

of said lands and the predecessors in interest of the defendants in [101-A] this suit, against said John Irwin, for the said lands described in the Bill; that thereafter and on the 6th day of October, 1883, said action was removed by said defendant Irwin to the United States Circuit Court, Ninth Judicial Circuit, for the District of California; that said lands were claimed by the plaintiffs in said action under the Swamp Land Act of September 28, 1850 (9 Stats. 519) as successors in interest to the State of California; that defendant Irwin was represented in said action by said S. G. Hilborn, the United States District Attorney for the District of California, and in addition thereto, the Attorney General of the United States appointed Judge A. L. Rhodes a special assistant attorney of the United States to appear in said case on behalf of the complainant and to assist in the defense of said action, and said counsel in fact conducted the defense of said action; that the only right, title or interest in or to said lands set up by defendant Irwin in defense of said action was the title to the aforesaid lands claimed by complainant herein, said defendant Irwin and said counsel expressly disclaiming that said defendant had any other right, title or interest in or to said lands or any part thereof; that said defendant and said counsel asserted and presented evidence in an attempt to show that the complainant herein had title

to said lands as a part of Mare Island by virtue of being successor in interest of said Victor Castro under the aforesaid Mexican grant of said Mare Island to said Victor Castro and that complainant also had title [102] thereto by virtue of the reservations attempted to be made by the President of the United States referred to in Subdivisions VI and VII of the Bill, said contentions both as to said lands being a part of said Mare Island and included in said grant to Victor Castro and as to said reservations by the President of the United States being in all respects precisely the contentions now made on behalf of the complainant in this suit; that said action was tried before Mr. Justice Field of the United States Supreme Court then sitting on circuit and before District Judge Hoffman, and they expressly found and held that said lands were not a part of Mare Island nor were they or any part thereof included within said grant of said Mare Island to said Victor Castro; and that none of said lands was affected by the said attempted reservations by the President of the United States mentioned in subdivisions VI and VII of the Bill, and that complainant had no right or title thereto, but that, on the contrary, the title thereto was in the plaintiffs in said action; that the opinion of the court in so holding is reported in full in 28 Fed. 708; that thereafter the Acting Attorney General of the

United States wrote to said Judge Rhodes, special counsel for complainant as aforesaid, and directed him to sue out a writ of error in said action; that pursuant to such direction a writ of error was sued out and the matter brought before the Supreme Court of the United States; that said cause was argued before the Supreme Court of the United States on behalf of the plaintiff in error, the said John Irwin, by Mr. Assistant Attorney [103] General William A. Maury representing the complainant herein; that on the 3rd day of February, 1890, the Supreme Court of the United States affirmed the judgment in favor of said plaintiffs in said action, the Supreme Court's opinion being reported in 136 U. S. 578; that following such affirmance and based thereon complainant thereafter issued patents to the State of California covering all of the lands described in the Bill, all as hereinafter more particularly set forth; that notwithstanding the facts aforesaid and for the purpose of affording a pretended ground for re-litigating the matters which were decided in said action and of adversely affecting the rights of the defendants in this suit, complainant procured the making and entry of said decree nunc pro tunc as aforesaid.

III.

Answering the allegations of Subdivision IV of the Bill, this defendant denies that said Board of Land

Commissioners was vested with or had any power or authority to make the confirmation alleged and set forth in the Bill, either by virtue of the Act of Congress approved March 3, 1851 (9 Stats. 631) or otherwise or at all, but on the contrary allege the fact to be that said Board had no power or authority or jurisdiction in the premises on account of the facts and circumstances set forth in the preceding subdivision of this Answer; admits that said Bissell and Aspinwall, claiming a right to said Mare Island under the aforesaid grant to Victor Castro, presented their said claim to said Board of Land Commissioners, but denies [104] that said Bissell and Aspinwall, or either of them, then had or ever had any right or title to said Mare Island; or any part thereof, derived either directly or indirectly from the Mexican Government or otherwise or at all; alleges that prior to the taking or presentation of any evidence before said Board, said Bissell and Aspinwall sold and conveyed all of their right and title to said Mare Island to the complainant herein, all as in the preceding subdivision of this Answer set forth; alleges that the evidence presented to and considered by said Board was presented and considered under the circumstances hereinabove set forth and not otherwise; denies that said Board determined the validity of said claim to Mare Island, and alleges that the facts in this behalf are as in the preceding subdivision of this Answer set forth and not otherwise; admits that said Board on October 23, 1855, filed a certi-

fied transcript of said case and of their proceedings and decision with the Clerk of this Honorable Court, but denies that said proceedings, or any of them, or that said decree, was valid, and alleges the fact to be that the same were and each of them was null and void and of no effect, all as more particularly set forth in the preceding subdivision of this Answer.

Further answering the allegations of subdivision IV of the Bill, this defendant denies that pursuant to the terms of Sections 9 and 10 of the aforesaid Act of March 3, 1851 (9 Stats. 631), or otherwise, complainant herein, either by its District Attorney or otherwise, duly presented its petition to this Honorable Court praying a review of said decision and decree of said Board, or for a decision upon the validity of said claim to Mare Island, or that complainant herein, duly or otherwise, complied with the law or the requirements governing such [105] petitions for review, but on the contrary alleges the true facts to be as stated in the preceding subdivision of this Answer and not otherwise; denies that the aforesaid minute order of this Court of March 2, 1857, purporting to be for a decree confirming said decree of said Board was duly given or made, but on the contrary alleges the fact to be that said minute order was made solely by reason of the facts and circumstances hereinbefore alleged. and alleges that said minute order was and is null and void and not binding upon these defendants, or any of them;

denies that the aforesaid decree nunc pro tunc was duly given or made, but on the contrary alleges the fact to be that said decree was made solely by reason of the facts and circumstances hereinbefore alleged, and alleges that said decree was and is null and void and not binding upon this defendant.

Further answering the allegations of Subdivision IV of the Bill this defendant admits and alleges that this defendant claims under and as a successor to the complainant herein by virtue of a grant made by complainant to the State of California on September 28, 1850, of all of the lands described in the Bill, said lands then being swamp and overflowed lands within the State of California, all pursuant to the Act of September 28, 1850 (9 Stats. 519), all of said last-mentioned lands being within and subject to the provisions of said swamp land grant; alleges this defendant claims an interest in said lands as more particularly set forth in "Exhibit A" to this Answer; denies that this defendant, or any of his predecessors in interest, are or were in privity with complainant herein in said appeal from said decision of said Board of Land Commissioners, but on the contrary alleges the [106] fact to be that complainant herein had no right or power or authority whatever to represent this defendant, or any of his predecessors in interest (other than complainant itself) in said proceedings; denies that this defendant is bound by said nunc pro tunc decree, but on the contrary alleges the fact to be that this defendant is not bound

thereby; denies that any of the proceedings aforesaid in any way related to or included or involved or affected any of the lands described in the Bill, and particularly any of the lands of this defendant described in "Exhibit A" to this answer; and alleges the fact to be that none of said proceedings in any way related to or included or involved or affected any of said lands.

IV.

Answering the allegations of subdivision IV (a) of the Bill, as added by amendment thereto, this defendant denies that in July, 1877, the Surveyor General of California in compliance with the thirteenth section of the act entitled "An Act to ascertain and settle the private Land Claims in the State of California", approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and in this connection alleges the facts to be that in July, 1877, purporting to act pursuant to the provisions of an act entitled "An Act to expedite the settlement of titles to lands in the State of California" approved July 1, 1864 (13 Stats. 332), the United States Surveyor General of California appointed United States Deputy Surveyor James E. Freeman as special deputy to survey the claim for Mare Island although no final decree of confirmation had been made or entered; that [107] pursuant to such appointment said James E. Freeman made what purported to be survey and plat of said Mare Is-

land which were filed in the office of said Surveyor General of California in or about the month of August, 1877; admits that said Surveyor General of California thereupon gave notice that the same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, the "Alta California", and one published near the land surveyed, to wit, the "Vallejo Evening Chronicle" published in the City of Vallejo, County of Solano, State of California, and alleges the fact to be that the date of first publication in San Francisco was October 11, 1877; admits that said Surveyor General of California retained in his office for public inspection the said survey and said plat until ninety days from the date the first publication in San Francisco had expired; denies that no objections were made to said survey and alleges the fact to be that on the 14th day of July, 1879, a protest against said survey and said plat of Mare Island was filed in the office of said Surveyor General of California by Bernard T. Hanley, Esq., as attorney for owners; denies that said Surveyor General of California approved said survey and said plat or either of them and alleges the fact to be that said Surveyor General of California expressly disapproved of the same because they improperly included a large quantity of land which was not a part of said Mare Island, the said lands so erroneously included being for the most part the very lands which are the subject of this litigation, said Surveyor Gen-

eral of California disapproving the inclusion of any of the lands involved in this litigation as a part [108] of said Mare Island; alleges the fact to be that said survey and said plat did not include or even purport to include any portion of the lands owned by this defendant, and described in "Exhibit A" to this answer, which lie to the north and east of said Dutchman's Slough; denies that copies of said survey and said plat were, or that a copy of either of them was, forwarded by said Surveyor General of California to the Commissioner of the General Land Office at Washington for his examination and approval at the expiration of said ninety days after the aforesaid date of first publication in San Francisco and alleges the fact to be that at no time prior to August 7, 1879, was any copy of said plat or of said survey forwarded to said Commissioner of the General Land Office for his examination and approval; denies that thereafter the Commissioner of the General Land Office approved said survey or said plat but alleges the fact to be that said Commissioner of the General Land Office has never approved said survey or said plat; alleges that this defendant is without knowledge as to whether said Commissioner of the General Land Office caused the said survey or said plat to be filed in a jacket called the Mare Island Jacket in the files of military reservations in the General Land Office; denies that thereafter and on September 22, 1905, or at any other time, the Commissioner of the General Land Office expressly or

otherwise approved or used or acted upon said purported survey or said purported plat, and alleges the fact to be that at no time has said Commissioner of the General Land Office ever expressly or otherwise approved or used or acted upon the said survey and the said plat, or either of them; [109] denies that thereafter and on September 28, 1905, or at any other time the Secretary of the Interior expressly or otherwise approved or concurred in any action of the Commissioner of the General Land Office in approving said survey or said plat or in using or acting upon the same, or that said Secretary of the Interior ever approved or used or acted upon said survey or said plat and alleges the fact to be that the Secretary of the Interior has never approved said survey or said plat or used or acted upon them, or either of them; admits that some of the lands described in the Bill were erroneously included within the exterior limits of said survey, but denies that all of said lands were so included and alleges the fact to be that a very large portion of the lands described in the Bill was never included within the exterior limits of said survey, particularly the said portion of this defendant's said lands lying north and east of said Dutchman's Slough, and alleges the fact to be that such of said lands described in the Bill as were included within the exterior limits of said survey were erroneously included therein and that, because of said erroneous inclusion, said survey was never approved either by the United States Sur-

veyor General of the State of California or by the Commissioner of the General Land Office or by the Secretary of the Interior, but was expressly disapproved by said United States Surveyor General; denies that any of the said lands described in the Bill was or is included within the exterior limits of said pretended Spanish grant of Mare Island, and alleges the fact to be that none of said lands was included within said grant. [110]

V.

Answering the allegations of Subdivision V of the Bill, this defendant admits and alleges that complainant acquired such title and interest in said Mare Island and in the lands described in the Bill as said Bissell and Aspinwall and as said Mary S. McArthur had, but denies that they, or any of them, ever had any title to or interest in said Mare Island, or in or to said lands described in the Bill, or in or to any part thereof; admits that complainant paid a valuable consideration to said Bissell and Aspinwall and McArthur of $83,491; admits that complainant received a deed purporting to convey said Mare Island and some of the lands described in the Bill from said Bissell and Aspinwall and McArthur on January 4, 1853, but alleges the fact to be that said deed did not include or purport to include any of the said lands of this defendant, and particularly said lands lying north and east of said Dutchman's Slough, and further alleges that said deed conveyed no right or title or

interest whatever in or to said lands described in the Bill, or any thereof, to complainant; admits that said deed was filed for record and recorded in the County Recorder's office of Solano County, California, on April 18, 1853, and that a copy of said deed is attached to the Bill and marked "Exhibit B", but alleges the fact to be that said copy is incomplete in that said copy does not contain or disclose the survey upon the basis of which said grantors executed their said deed and conveyed thereby all of their interest in and to "that tract of land and island called and known as Mare Island, in the Bay of San Francisco, as recently surveyed by the board of officers [111] of the United States sent to California for the selection of a site for a navy yard there"; denies that all of the lands described in the Bill now are or ever were situate in said County of Solano, State of California, and on the contrary alleges the fact to be that a considerable portion of Sections 31, 32 and 33 of Township 4 North, Range 4 West, and of Sections 34, 35 and 36 of Township 4 North, Range 5 West, M. D. B. and M. are now and ever since a long time prior to January 1, 1853, have been situate in the County of Napa, State of California.

VI.

Answering the allegations of Subdivision VI of the Bill, this defendant admits that on November 6, 1850, the President of the United States by executive order reserved from sale and for public pur-

poses Mare Island; denies that said Mare Island so reserved ever included, or now includes, the lands described in the Bill, or any of said lands, and in particular any of the said lands of this defendant, and alleges the fact to be that none of the said lands was ever reserved by the President of the United States, either by executive order or otherwise, for public or any other purposes or at all, and further alleges the fact to be that none of said lands has at any time subsequently to September 28, 1850, been public land of the United States or subject to reservation by the United States, but that on the contrary, all of said lands were upon said last-mentioned date granted by the United States to the State of California, and have ever since been owned by the State of California and its subsequent grantees. [112]

VII.

Answering the allegations of Subdivision VII of the Bill, this defendant admits that on February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of Section 3 of the Act of August 3, 1852 (10 Stats. 104) selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said Island, and the harbors, waters and anchorages connected therewith and necessary to the use

of the same, as a site for the Navy Yard and Naval Depot provided for by said Act of Congress, but denies that within said lands are included the lands and premises, or any of the lands or premises, described in the Bill, and in particular any of the said lands of this defendant, and alleges the fact to be that none of the lands described in the Bill, and none of the lands of this defendant, was within the lands so selected by said Secretary of the Navy.

Further answering the allegations of Subdivision VII of the Bill, this defendant admits that following the aforesaid selection, the Secretary of the Navy on February 9, 1853, recommended to the President of the United States that the said lands and premises selected by him as above stated be reserved for public uses, and that on February 11, 1853, President Millard Fillmore approved said recommendation and made said reservation and that said reservation was communicated to the Secretary of the Interior and duly and properly recorded, but alleges the fact to be that none of the lands [113] described in the Bill, and none of the said lands of this defendant was included within the lands so reserved.

Further answering the allegations of Subdivision VII of the Bill, this defendant admits that a copy of the aforesaid selection and recommendations of the Secretary of the Navy, together with the approval of the President of the United States, and his order making said reservation, is attached to the Bill, and marked "Exhibit C", but alleges the

fact to be that said copy is incomplete in that said copy does not include the map or chart referred to therein; admits that from time to time the Congress of the United States has approved, ratified and confirmed said reservation of Mare Island and by various statutes has appropriated large sums to improve the lands comprised therein and authorized their improvement, but, as aforesaid, alleges the fact to be that none of the lands described in the Bill was or is included within the lands so reserved.

VIII.

Answering the allegations of Subdivision VIII of the Bill, this defendant denies that the lands and premises, or any of the lands or premises, described in the Bill is or are included within the boundaries, or is or are a part of the lands or premises described in the alleged grant from Juan B. Alvarado, Governor of California under the rule and occupation of Mexico, to Victor Castro, or that said lands or premises, or any thereof, were or was conveyed by said Juan B. Alvarado to said Victor Castro, but on the contrary alleges the fact to be, as aforesaid, that said grant was fraudulent and void, and that no grant of any lands was ever made by said [114] Juan B. Alvarado to said Victor Castro; denies that any confirmation of said grant was ever made by said Board of Land Commissioners to George W. P. Bissell and William H. Aspinwall, or to either of them, or otherwise or at all; denies that said lands and premises, or any

thereof, are or is included within the boundaries of, or are or is a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor, Mary S. McArthur, or from any of them, and in this connection allege the facts to be as hereinabove in this manner set forth.

IX.

Answering the allegations of Subdivision IX of the Bill, as amended, this defendant denies that continuously since September 16, 1852, and up to and including the year 1880, or at any other time, or at all, complainant occupied the lands, or any of the lands, described in the Bill, by or through its Navy Department and officials or otherwise, or that complainant has used or improved the same, or any thereof, for military purposes in connection with the Naval Station, Navy Yard and premises of the United States on Mare Island, or otherwise or at all.

Further answering said Subdivision IX of the Bill, as amended, this defendant alleges the fact to be that complainant has at no time since September 28, 1850, had possession of or been entitled to possession of the said lands described in the Bill, or any thereof; denies that the alleged possession of complainant during the period from September 16, 1852, to and including the year 1880, was at all times or ever actual or open or adverse or exclusive or under claim of right [115] or under title or under claim or color of title, either that sup-

plied by the aforesaid reservations or by the said deed of January 4, 1853, or by the said decision of the Board of Land Commissioners of May 8, 1855, or by said minute order of this Honorable Court given and made on March 2, 1857, or by said decree of this Honorable Court of April 15, 1930, by relation, or otherwise, or at all; admits that the lands of Mare Island, but denies that any of the lands described in the Bill, were, during the aforesaid period, improved for military and naval purposes by the construction of buildings and improvements thereon, and of signs warning trespassers that said premises were government property; denies that there was about the year 1873 or at any other time located upon the lands described in the Bill a dwelling house erected or maintained or occupied by or on behalf of complainant; denies that a road has ever been built thereon by, or has ever been used under the authority of, complainant; denies that complainant has ever used the lands in question, or any part thereof, for gun range or for target practice; denies that complainant from time to time excavated or dug in said lands or used them, or any thereof, for sand or gravel pits or as a source of supply for said sand or gravel either as complainant required for its use in connection with its use and occupancy of said Naval Reservation or otherwise or at all, and alleges the fact to be that if any of said things had been done by complainant, complainant was thereby a trespasser upon lands which did not belong to it but belonged to this defendant

and to his predecessors in interest; denies that all of the lands described in the Bill, or that any of them, and in particular [116] any of said lands of this defendant, were or was used by complainant in connection with the operation or activities of its naval or military forces or otherwise; alleges that this defendant is without knowledge as to any of the following matters alleged in said Subdivision IX of the Bill, as amended,—"In November, 1873, plaintiff went upon said land described in paragraph II and posted at frequent intervals thereon signs and notices that said property was Government property, and warning trespassers to keep off thereof", and alleges the fact to be that if said things were done by complainant, as so alleged, complainant was thereby a trespasser upon lands which did not belong to it, but belonged to this defendant and to his predecessors in interest.

Further answering the allegations of said Subdivision IX of the Bill as amended, this defendant admits that on the 8th day of July, 1886, or thereabouts, the Circuit Court of the United States for the District of California in an action of ejectment therein pending and numbered 3140 in the records and files of said Court, in which plaintiff was not a party, and in which San Francisco Savings Union, a corporation, and others, were plaintiffs, and John Irwin, then Commandant of complainant's navy yard aforesaid, was defendant, gave and made a judgment in favor of said plaintiffs and against said defendant for the recovery by said

plaintiffs from said defendant of the possession of said lands in the Bill described, and in this connection alleges that the facts with respect to said action are as hereinabove in Subdivision II of this answer set forth [117] and not otherwise; denies that complainant herein was not represented in said action, but on the contrary alleges the fact to be that complainant herein was represented in said proceedings by its own counsel especially employed for that purpose and for the purpose of seeking to aid in the defense of said action, as in Subdivision II of this answer alleged; admits that this defendant and his predecessors have entered upon and occupied that portion of said lands which is owned by him and described in "Exhibit A" to this answer, but denies that said occupancy was or is in consequence of said judgment, and in this connection alleges the fact to be that this defendant and his predecessors were in possession and occupation of said lands long prior to said judgment and that they continued in the possession and occupancy of said lands thereafter and continuously up to the present time; admits that this defendant has withheld possession of said lands from complainant, without complainant's consent, and in this connection alleges, as aforesaid, that complainant is not and never has been since September 28, 1850, entitled to the possession of said lands or any thereof; denies that this defendant has no other entry or right of entry or possession of said lands, except after said judgment, but alleges the fact to be that defendant and his predecessors

(exclusive of complainant) have had entry and right of entry and right of possession of and to all of said lands ever since September 28, 1850.

X.

Answering the allegations of Subdivision X of the Bill, this defendant admits and alleges that the lands [118] described in the Bill were claimed by the State of California under and by virtue of the Act of September 28, 1850 (9 Stats. 519) commonly known as the "Swamp Land Act", by which the whole of those swamp and overflowed lands within the State of California made unfit thereby for cultivation, comprising part of the public domain of the United States of America on the date of passage of said Act and remaining unsold, were granted to the State of California; alleges that said lands and all of said lands described in the Bill were of the character described in the aforesaid Act of September 28, 1850, and were at the date of said Act part of the public domain and unsold and by said Act passed to the State of California; admits and alleges that said lands were surveyed in the year 1869 under the authority of the State of California and identified by said survey as Survey No. 569 and as containing 7413.48 acres in area, and that thereafter the State of California issued its patent conveying all of the lands included in said survey to George W. Pearson under date of April 7, 1874, and describing them according to said Survey No. 569.

XI.

Answering the allegations of Subdivision XI of the Bill, this defendant admits that he claims a right, title or interest in or to said lands described in the Bill, through and by virtue of mesne conveyances vesting in him the title of said George W. Pearson or some part or parcel thereof, and in this behalf alleges that this deefndant claims the right, title or interest in and to said lands more particularly set forth in "Exhibit A" attached hereto; admits that this defendant claims such right, title [119] or interest adversely to the complainant; denies that such claim is without right or foundation in law or in fact, but on the contrary alleges the fact to be that all of said claim is of right and is founded both upon law and fact; alleges that this defendant is without knowledge as to any of the following matters alleged in said Subdivision XI of the Bill—"That there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of this complaint, adverse to the complainant's ownership, and casting a cloud upon the complainant's title therein; that the claims of said persons are wholly without rights or merit in law or in fact".

XII.

Answering the allegations of Subdivision XII of the Bill, this defendant admits and alleges that on April 26, 1924, a patent numbered 937055 was issued to the State of California by the United States

under the provisions of said Act of September 28, 1850, known as the Swamp Land Act, which said patent included all of the lands described in subparagraph (B) of Subdivision II of the Bill which lie in Township 3 and 4 North, Range 4 West, M. D. B. and M.; admits and alleges that on June 5, 1896, a patent known as Swamp Land Patent No. 72 was issued to the State of California by the United States under the provisions of said Swamp Land Act, which said patent included all of fractional Section 1 of Township 3 North, Range 5 West, M. D. B. and M., containing an estimated area of 177 acres described in subparagraph (B) of Subdivision II of the Bill; and admits and alleges that on [120] February 7, 1910, a patent known as Swamp Land Patent No. 152 was issued to the State of California by the United States under the provisions of said Swamp Land Act, which said patent includes all of the lands described in subparagraph (B) of Subdivision II of the Bill lying in Township 4 North, Range 5 West, M. D. B. and M.

Further answering the allegations of said Subdivision XII of the Bill this defendant alleges that each of the said patents is, and ever since the date of its issuance has been, in all respects valid and in full force and effect, and denies that said patents then were or now are, or that any of said patents then was or now is, either void, or of no force or effect, or of no validity, in so far as the same grant or convey or include or describe the lands, or any

of the lands mentioned in the Bill, either for the reasons set forth in said Subdivision XII of the Bill, or otherwise or at all; denies that said lands described in said patents ever were, or that any of said lands ever was, held in private ownership under or by virtue of the aforesaid alleged grant from Mexico to said Victor Castro, either at the time of the passage and approval of said Swamp Land Act, or at any other time or at all; denies that said lands were not then a part of the public domain, but on the contrary allege that at the date of said Swamp Land Grant to-wit, September 28, 1850, all of said lands described in the Bill were part of the public domain of the United States; denies that complainant has owned or occupied any of said lands at any time other than as a part of the public domain, and denies that complainant has ever owned or occupied said lands, [121] or any of them, as the successor in interest to said Victor Castro under said grant from the Government of Mexico; denies that any of said lands has ever been selected for or devoted to the public purposes of the United States, and denies that any of said lands has ever been withdrawn from entry by private persons as alleged in Subdivision VI and VII of the Bill, or otherwise (except as a result of the grant of said lands to the State of California under said Swamp Land Act, as aforesaid) either prior to the issuance of the aforesaid patents, or any of said patents, or at any other time or at all.

XIII.

Answering the allegations of Subdivision XIII of the Bill, this defendant alleges that he has no knowledge of any of the matters or things in said Subdivision alleged.

XIV.

Answering the allegations of Subdivision XIV. of the Bill this defendant denies that complainant is without adequate remedy in the premises at law, and denies that complainant is entitled to any remedy whatsoever in the premises.

Wherefore, this defendant prays judgment as follows:

1. That complainant is not the owner of any of the real property described in "Exhibit A" attached to this answer, or to any part thereof, and that complainant has no right or title or interest in or to said real property, or any part thereof.

2. That this defendant is the owner of the interest in said real property described in said "Exhibit A" set [122] forth therein, and that said defendant is in and entitled to possession of such interest.

3. That the complainant be perpetually enjoined from asserting any claim or title whatsoever in or to said real property, or any thereof, adverse to this defendant.

4. That this defendant have such further or different relief as may be agreeable to equity and good conscience.

5. That this defendant have and recover his costs of suit herein incurred.

W. H. SPAULDING
STONEY, ROULEAU,
STONEY & PALMER
Solicitors for said Answering Defendant.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

James Irvine, being first duly sworn, deposes and says:

That he is one of the defendants named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JAMES IRVINE

Subscribed and sworn to before me this 18th day of March, 1936.

[Seal] W. W. HEALEY
Notary Public in and for the City and County of San Francisco, State of California. [123]

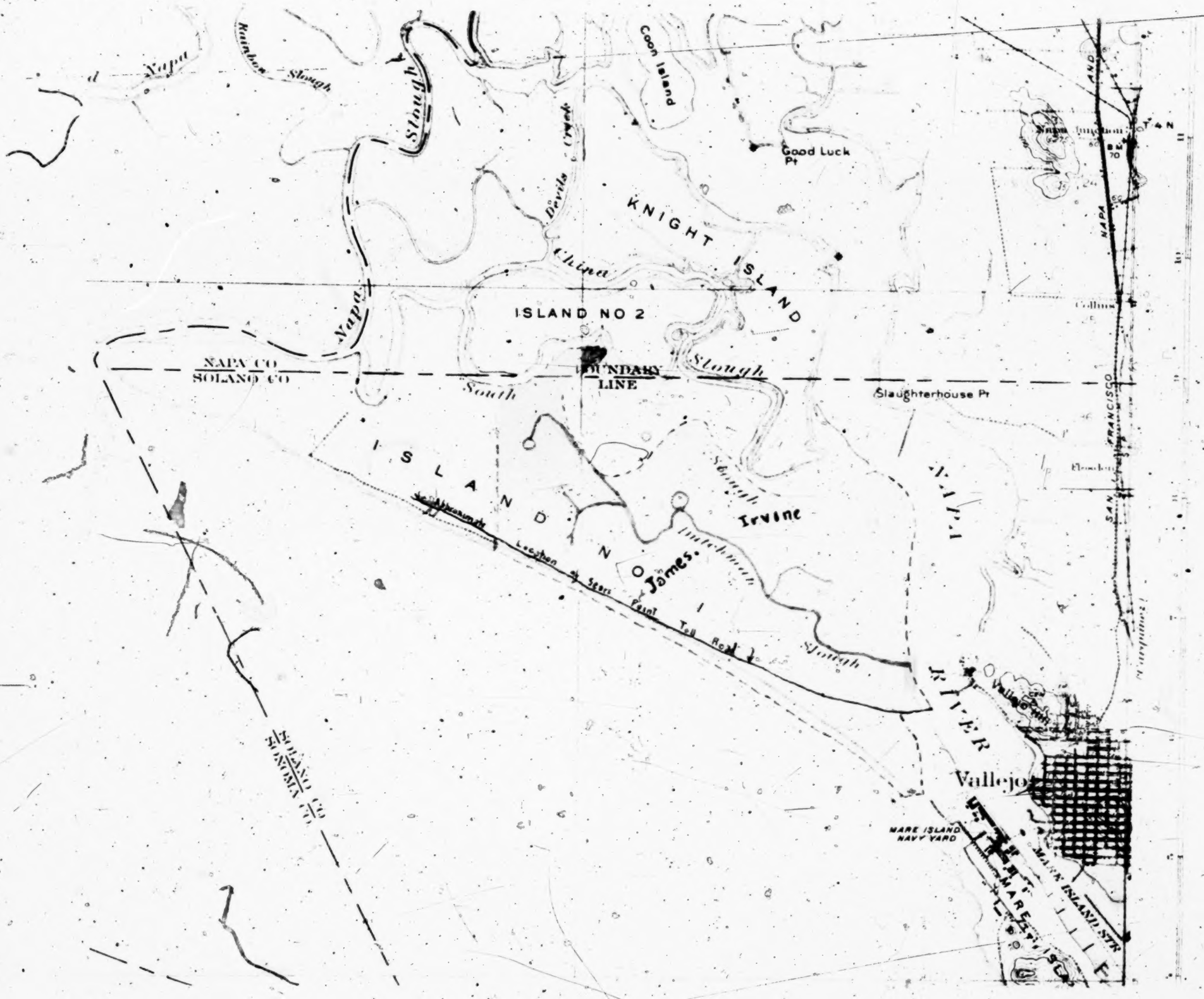
"EXHIBIT A"

[Printer's Note]: Here follows description of parcel of land with statement of ownership substantially as it appears in Exhibit "A" to the Judgment.

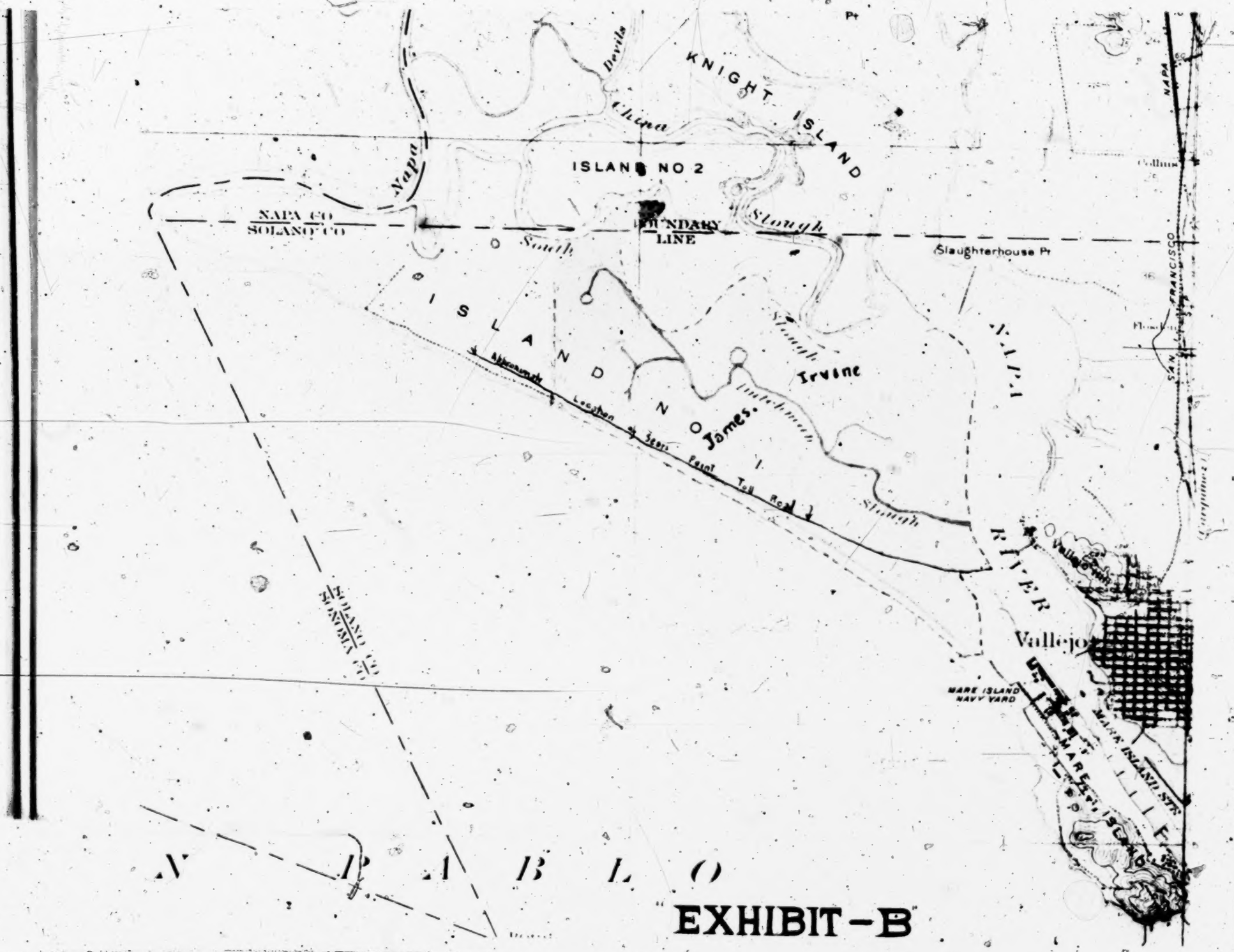
[Endorsed]: Due service and receipt of a copy of the within Answer is hereby admitted this 18th day of March, 1936.

H. H. McPIKE,
U. S. Atty.
ESTHER B. PHILLIPS
Asst. U. S. Atty.
Solicitors for Complainant.

[Endorsed]: Filed March 18, 1936. [124]



Napa
Rainbow Slough
Slough
Coon Island
Good Luck Pt
Devils Creek
KNIGHT ISLAND
China
ISLAND NO 2
Napa
NAPA CO
SOLANO CO
BOUNDARY LINE
South
Slough
Slaughterhouse Pt
ISLAND NO 1
Slough
Irvine
James
Slough
NAPA RIVER
Vallejo
MARE ISLAND NAVY YARD
MARE ISLAND STR
SOLANO CO
SONOMA CO
NAPA
SAN FRANCISCO
Collins
Flosden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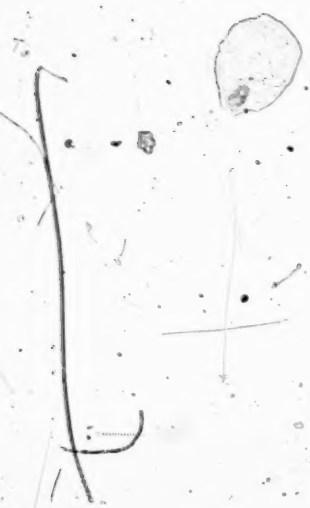
Devils
China
Napa
ISLAND NO 2
NAPA CO
SOLANO CO
BOUNDARY LINE
South
Slough
Slaughterhouse Pt
ISLAND NO 1
Irvine
James
Slough
Approximate Location of Sears Point Toll Road
NAPA RIVER
Vallejo
MARE ISLAND NAVY YARD
MARE ISLAND STR
MARE ISLAND
SOLANO CO
SONOMA CO
N P A B L O
NAPA
SAN FRANCISCO

EXHIBIT-B



[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT JAMES IRVINE TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO.

Comes now defendant James Irving, and, with leave of [125] court first had and obtained, files the following amendment to his answer to complainant's amended bill of complaint on file herein and the Amendments thereto on file herein (all hereinafter for convenience referred to as the Bill), and admits, denies and alleges as follows, to-wit:

Third Defense

The Established Public Boundary of the Mare Island Navy Yard Reservation.

As a third, separate and distinct defense and answer to the Bill, this defendant alleges as follows:

I.

That the Mare Island Navy Yard Reservation (hereinafter for convenience referred to as said Mare Island Reservation) is a naval reservation of the United States, and the territory thereof is territory of the United States subject to the exclusive jurisdiction, dominion and sovereignty of the United States and not to the jurisdiction, dominion or sovereignty of the State of California. That such exclusive jurisdiction, dominion and sovereignty were acquired by the United States as follows:

On November 6, 1850, and again on February 11, 1853, the President of the United States, by execu-

tive order, reserved Mare Island from sale and for public use as a navy yard and naval depot. In addition, in 1853 the United States purchased the claims of certain private persons to said Mare Island and this purchase was consented to by the State of California by acts of her Legislature adopted April 27, 1852 (Cal. Stats. 1852, p. 149) and May 11, 1854 (Cal. Stats. 1854, p. 161). By [126] the act of the Legislature of the State of California of March 2, 1897 (Cal. Stats. 1897, p. 51) the State of California expressly ceded exclusive jurisdiction to the United States of all lands within said State held, occupied or reserved by the United States for military purposes or defense, which cession included the lands then occupied by the United States as said Mare Island Reservation, said act requiring that a sufficient description of such lands be filed in the proper office of record in the counties in which the same were situated, and the United States, pursuant to said act, filed and recorded in the office of the County Recorder of the County of Solano (that being the county within the exterior boundaries of which said Mare Island Reservation is situate) a sufficient description of said Mare Island Reservation, said filing being a map showing the boundaries of said Mare Island Reservation, which map was recorded November 10, 1913, in Book 5 of Maps, page 4, Solano County Records.

II.

That the lands described in Subdivision II of the Bill are the lands embraced within that certain

state segregation survey known as Swamp and Overflowed Land Survey No. 569 (hereinafter for convenience referred to as Survey 569).

That beginning in the year 1890 and consistently ever since (except for the filing of this action on April 22, 1930) the United States has recognized that the northwesterly boundary of said Mare Island Reservation did not extend beyond or to the north of the southeasterly boundary of said Survey 569. Said southeasterly boundary of said Survey 569 has been established, recognized and acquiesced in by the United States as [127] the line beyond which said Mare Island Reservation did not extend, and at no time since 1890 has the United States asserted or attempted to assert or exercise jurisdiction, dominion or sovereignty over any of the lands within said Survey 569 as a part of said Mare Island Reservation. On the contrary, ever since 1890 the State of California has, with the knowledge of and without objection by the United States, consistently asserted and exercised its jurisdiction over all of said lands as lands subject to its jurisdiction, dominion and sovereignty and as lands which were not within or a part of said Mare Island Reservation.

That said southeasterly boundary line of said Survey 569 became the established, recognized and accepted public boundary line limiting the extent of said Mare Island Reservation in the manner next hereinafter set forth.

III.

Mare Island is now and at all times has been a body of high land rising out of the waters of San Pablo Bay, being surrounded, except at its extreme northwesterly end, by the waters of said Bay and of Carquinez and Mare Island Straits. Said Island extends lengthwise in a northwesterly and southeasterly direction a total distance of about 2½ miles. At its northwesterly end it was long prior and long subsequently to 1850 connected by a narrow neck of marsh, in places less than 600 feet wide, with a great area of swamp and overflowed lands extending to the north and west seven or eight miles. Prior to 1850 and for many years thereafter said narrow neck of marsh was submerged and completely covered with water at least at [128] times of extreme high tide. The said great area of swamp and overflowed lands to the north and west was also, at extreme high tide, largely covered with water, and except for a sand ridge along the shore of San Pablo Bay washed up by the waters of said Bay, was swampy and marshy and in good part subject to overflow and was entirely unfit for cultivation or use of any kind without reclamation.

That most of said swamp and overflowed lands to the north and west lay within the boundaries of said Survey 569, which was surveyed on behalf of the State of California in June of 1869. The swamp and overflowed lands lying between the southeasterly boundary of said Survey 569 and said Mare Island, including said narrow neck of marsh, were

embraced within that certain state segregation survey known as Swamp and Overflowed Land Survey No. 34, which survey is hereinafter for convenience referred to as Survey 34.

IV.

That in the year 1853 the United States took possession of Mare Island and commenced the establishment of a navy yard and navy depot thereon and has ever since occupied said Island as a reservation for naval purposes, with the consent of the State of California as hereinbefore set forth, and has exercised exclusive jurisdiction, dominion and authority over said Island and said naval reservation.

V.

That on September 28, 1850, the United States, by Act of Congress known as the Swamp Land Act, granted [129] to the State of California all unsold swamp and overflowed lands unfit for cultivation lying within said State. All of the lands within said Survey 569 were lands of the character described in said Swamp Land Act, and pursuant to said Act passed to the State of California by said grant.

On or about the 7th day of April, 1874, the State of California having theretofore and in the year 1869 sold the lands in Survey 569 to one Jacob C. Hinckley issued its patents for said lands to one John W. Pearson as assignee of said Hinckley, from whom this defendant acquired by mesne con-

veyances those portions of said Survey 569 owned by him and more particularly described in "Exhibit A" to the Answer of this defendant.

VI.

When the United States first took possession of said Mare Island as a naval reservation as aforesaid, it did not occupy any of the lands within said Survey 34 nor any of the lands within said Survey 569, although almost from the outset it used nearby portions of Survey 34 as a dumping area and also as a place from which it procured sand for use at said Navy Yard and on a few occasions placed targets on said Survey 34 for use in target practice. The United States has never at any time used any portion of the lands lying within said Survey 569 for any purpose whatsoever in connection with said Mare Island Reservation.

Prior to September 13, 1883, one John Irwin, as the then commandant of Mare Island Navy Yard, claimed and asserted the [130] right to possession of said Survey 569 on behalf of the United States and excluded therefrom the predecessors in interest of this defendant. On September 13, 1883, said predecessors in interest of this defendant brought an action in ejectment against said John Irwin for the recovery of said Survey 569, all as more particularly set forth in subparagraph (a) of Subdivision II of the first defense in the Answer of this defendant. As stated in subparagraph (a), said action was defended at the expense and on behalf

of the United States and upon the ground that the lands of which said commandant had taken possession were a part of Mare Island and were owned by the United States as a part of said Mare Island Reservation. On July 8, 1886, the United States Circuit Court, Ninth Judicial District for the District of California, gave judgment in said action in favor of the plaintiffs therein and against said commandant, expressly finding and holding that the lands embraced in said Survey 569 were not a part of Mare Island and were not owned by the United States as a part of said Mare Island Reservation or otherwise, but, on the contrary, the plaintiffs in said action were the owners thereof as the successors in interest of the State of California under the said Swamp Land Grant. The defendant in said action, at the expense and on behalf of the United States, prosecuted an appeal from said judgment to the Supreme Court of the United States, and on February 3, 1890, said judgment was affirmed by said court. Upon the affirmance of said judgment the plaintiffs in said action went into possession of said land and from and after that time until the commencement of this action said judgment was and has been accepted by the United States, and by the State of California, and by all persons interested therein as conclusively establishing that all of the lands in said Survey 569 were not a [131] part of Mare Island and were not owned by the United States.

Since the affirmance of said judgment the southeasterly boundary line of said Survey 569 has consistently been recognized by the United States as the public boundary line between said Mare Island Reservation and the territory subject to the jurisdiction, dominion and sovereignty of the State of California, and the State of California has ever since the affirmance of said judgment consistently exercised jurisdiction, dominion and sovereignty over all of the lands lying to the north and west of said boundary line, including all of the lands embraced in said Survey 569, all as evidenced by the following acts among others:

(a) The State of California has consistently taxed the real and personal property in said Survey 569; has included the lands therein in election districts and voting precincts; has exercised through its courts civil and criminal jurisdiction within said Survey 569; and has, through its subordinate instrumentalities, granted franchises for toll roads across said lands. In addition thereto, the predecessors in interest of this defendant have reclaimed large portions of the lands within said Survey 569, and for more than thirty years prior to the filing of this action have been in the undisturbed possession and occupancy of said lands and have cultivated and lived on the same.

The United States, on the other hand, has not attempted to take possession of any of the lands to the north and west of said boundary line, either as a part of said Mare Island Reservation or other-

wise, nor has it attempted to exercise jurisdiction, dominion and sovereignty over any of said lands, as it has [132] consistently done with respect to the lands within said Mare Island Reservation, but has permitted, without objection, the reclamation and cultivation of the lands to the north and west of said line by this defendant and his predecessors in interest and the making of improvements thereon and the construction and use of toll roads, pipe lines and electric power lines across the same.

(b) In the year 1897 the then commandant of Mare Island Navy Yard and the then predecessors in interest of this defendant jointly caused a survey to be made for the purpose of determining the location of the southeasterly boundary line of said Survey 569 as the public boundary line beyond which the said Mare Island Reservation did not extend, and upon the determination of such boundary line the then predecessors in interest of this defendant, to the knowledge and without objection by the United States, constructed a levee on said line, as so determined, for the purpose of reclaiming the land to the north thereof. Subsequently it was discovered that the boundary line as so determined was erroneous and that the true southeasterly boundary line of said Survey 569 lay to the northwest of said line as theretofore established; whereupon, said boundary line was correctly located and thereafter and in December, 1914, the United States, with the acquiescence of the predecessors in interest of this defendant, erected and has ever since main-

tained a substantial post and wire fence along the true southeasterly boundary line of said Survey 569 as a boundary fence marking and indicating the line beyond which said Mare Island Reservation did not extend. [133]

(c) That as hereinbefore stated, on November 10, 1913, pursuant to said act of the Legislature of the State of California of 1897 ceding to the United States the exclusive jurisdiction over all lands within the State of California held, occupied or reserved by the United States for military purposes or defense, the United States filed and recorded in the office of the County Recorder of the County of Solano a map showing the boundaries of said Mare Island Reservation and upon said map the northwesterly boundary line of said Reservation is shown as the southeasterly boundary line of said Survey 569, as correctly located as in paragraph (b) heretofore stated.

(d) On June 5, 1896, the United States patented to the State of California all those portions of said Survey 569 lying in Township 3 North, Range 5 West, M. D. B. & M., and on February 7, 1910, the United States patented to the State of California all those portions of Survey 569 lying in Township 4 North, Range 5 West, M. D. B. & M., said patents being the patents referred to in the Bill herein as Swamp Land Patents Nos. 72 and 152 respectively. The lands so patented are the portions of said Sur-

vey 569 most remote from said Mare Island, the nearest point of the same being approximately five miles from Mare Island.

Thereafter application was made for the issuance of a patent to the State of California of the lands embraced within said Survey 569 lying between the lands patented as above set forth and the southeasterly boundary line of said Survey 569, said lands being those lying within Township 3 and 4 North, Range 4 West, M. D. B. & M. The Navy Department having theretofore indicated that the United States claimed said lands [134] as a part of said Mare Island Reservation, the Secretary of the Interior under date of October 18, 1912, addressed a letter to the Secretary of the Navy requesting of him such data as might be in the latter's possession relative to the limits of the lands embraced in Mare Island to the end that the matter of segregating the swamp and overflowed lands from said Mare Island might be considered. Under date of February 1, 1913, the Acting Secretary of the Navy addressed a reply to the Secretary of the Interior calling the latter's attention to the judgment in the action of ejectment against John Irwin hereinbefore mentioned, which held that the lands embraced within said Survey 569 were not a part of Mare Island and with said letter said Acting Secretary of the Navy forwarded to the Secretary of the Interior a plan showing the then limits of said Mare Island and showing that the northwesterly boundary line of said Mare Island Reservation did not extend beyond or to the north or west of

said southeasterly boundary line of said Survey 569.

Thereafter the Department of the Interior directed that appropriate surveys be made of said Townships 3 and 4 North, Range 4 West, M. D. B. & M., for the purpose of segregating the swamp and overflowed lands therein granted to the State of California by said Swamp Land Act and directed that such survey should be limited to the lands in said townships lying to the north and west of said southeasterly boundary line of said Survey 569 as established by the fence erected upon said boundary line by the United States as hereinbefore set forth. Such surveys were made and approved, and the Secretary of the Navy having expressed the view in a letter to [135] the Secretary of the Interior, under date of June 4, 1923, that all of the lands lying within said Survey 569 had been lost to the United States by reason of the judgment in said ejectment suit against John Irwin hereinbefore referred to, the Department of the Interior ordered all of the lands embraced within said Survey 569 lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. to be patented to the State of California, and pursuant to said instructions said lands were patented to the State of California by patent dated April 26, 1924, and numbered 937055.

W. H. SPAULDING
STONEY, ROULEAU, STONEY & PALMER
Attorneys for Defendant, James Irvine. [136]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Thomas E. Palmer, being first duly sworn, deposes and says:

That he is one of the attorneys for James Irvine, a defendant named in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that this pleading is verified by said attorney for the reason that said defendant is absent from the county where the attorneys for said defendant have their office.

THOMAS E. PALMER

Subscribed and sworn to before me this 25th day of May, 1937.

[Seal] EMI EGGERS DEL BONO
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 25, 1937. [137]

[Title of District Court and Cause.]

SECOND AMENDMENT TO ANSWER OF DEFENDANT JAMES IRVINE TO THE AMENDED BILL OF COMPLAINT AND TO THE AMENDMENTS THERETO

Comes now defendant James Irvine and with leave of Court first had and obtained files the fol-

lowing amendment to his answer to complainant's amended Bill of Complaint and the amendments thereto, all hereinafter for convenience referred to as the Bill, and admits, denies and alleges as follows, to-wit:

Fourth Defense
Equitable Estoppel

For a fourth, separate and distinct defense and answer to the Bill this defendant alleges as follows:

I.

Mare Island, referred to in the Bill herein, is and at all times has been a body of high land rising out of the waters of San Pablo Bay and surrounded, except at its extreme northwesterly end, by the waters of said Bay and of Carquinez and Mare Island Straits. It extends lengthwise in a northwesterly and southeasterly direction a total distance of about two and one-half miles and contains some 900 acres, more or less. In 1850 and prior thereto and for many years thereafter it was connected by a narrow neck of marsh less than 600 feet wide with a great area of swamp and overflowed lands extending to [138] the north and west seven or eight miles and containing some 7,000 acres, more or less. In 1850 and prior thereto and for many years thereafter said narrow neck of marsh land was submerged and completely covered with water at least at times of extreme high tide. The said area of swamp and overflowed lands to the north and west was also at extreme high tide

largely covered with water and, except for a sand ridge along the shore of San Pablo Bay washed up by the waters of said Bay, was swampy and marshy and subject to overflow and entirely unfit for cultivation or use of any kind without reclamation.

That most of said swamp and overflowed lands to the north and west lie within the boundaries of that certain State segregation survey known as Swamp and Overflow Land Survey No. 569, made on behalf of the State of California in June of 1869. The lands included within said survey are hereinafter referred to as Survey 569. The lands lying between the southeasterly boundary of said Survey 569 and Mare Island, including said narrow neck of marsh hereinbefore mentioned, are embraced within that certain State segregation survey known as Swamp and Overflow Land Survey No. 34, which lands are hereinafter referred to as Survey 34.

II.

On September 28, 1850, the United States, by Act of Congress known as the Swamp Land Act, granted to the State of California all unsold swamp and overflowed lands unfit for cultivation lying within said State. All of the lands within said Survey 569 were of the character of the lands so granted by said Act.

On or about the 7th day of April, 1874, the State of California, having heretofore and in the year 1869 sold the [139] lands in Survey 569 to one

Jacob C. Hinckley, issued its patents for said land to one John W. Pearson, as assignee of said Hinckley. Thereafter these defendants by mesne conveyances acquired from said Pearson those portions of said Survey 569 owned by them and more particularly described in Exhibit A to their answer.

III.

In 1853 certain private parties, to-wit: George W. P. Bissell, William H. Aspinwall and Mary S. McArthur, claimed to be the owners of Mare Island as the successors in interest of one Victor Castro, to whom they asserted the Government of Mexico had made a grant of said Island in the year 1841.

In said year 1858 the United States purchased from said Bissell, Aspinwall and McArthur all of their right, title and interest in and to Mare Island and thereupon, as alleged in paragraphs I and IV of the third defense of these defendants as set forth in the amendment heretofore made to their answer, took possession of Mare Island and established thereon and has ever since maintained a navy station or naval yard.

When the United States first took possession of said Mare Island as aforesaid, it did not occupy any part either of said Survey 34 or said Survey 569, and while thereafter it occupied and used portions of Survey 34 adjoining Mare Island, it has never at any time used any portion of said Survey 569 and, except as hereinafter set forth in subdivision V hereof, has not had possession or attempted to take possession of any portion of said survey.

IV.

On or about the 3rd day of January, 1883, one D. W. Bouldin and one A. P. Moore brought an action in ejectment against the then [140] commandant of the Mare Island Navy Yard, one Thomas S. Phelps, seeking to recover possession of Mare Island, claiming that they were the owners of said Island by virtue of the asserted grant of the same hereinbefore mentioned by the Mexican Government to Victor Castro, asserting in that behalf that they and not said Bissell, Aspinwall and McArthur were the successors in interest of said Castro. As alleged in subparagraph (a) of subdivision II of the first defense in the answer of this defendant, said action was defended by and at the expense of the United States, which set up by way of defense to said action that the purported grant to said Victor Castro, hereinbefore mentioned, under which said Bissell, Aspinwall and McArthur had claimed title to said Island and under which the plaintiffs in said ejectment suit, said Bouldin and Moore, were then claiming title, was in fact fraudulent and void and that the instrument purporting to constitute and evidence said grant had in fact not been made until 1850 and after the Mexican sovereignty of California had ceased. Upon the trial of said action said defense was sustained and it was held that said purported grant to Victor Castro was in fact fraudulent and void and that the instrument purporting to constitute and evidence said grant had not been made until 1850.

V.

Shortly prior to September 13, 1883, the then commandant of Mare Island Navy Yard, one John Irwin, asserted the right as such commandant to the possession of said Survey 569 as being property of the United States and excluded therefrom the predecessors in interest of this defendant. Thereupon and on September 13, 1883, said predecessors in interest of this defendant brought an action in ejectment against said Irwin for the recovery of said [141] Survey 569, all as more particularly set forth in subparagraph (b) of subdivision II of the first defense in the answer of this defendant. As there stated, said action was defended at the expense and on behalf of the United States and upon the ground that the lands of which said commandant had taken possession were a part of Mare Island and were owned by the United States. On July 8, 1886, the United States Circuit Court, Ninth Judicial District for the District of California, gave judgment in said action in favor of the plaintiffs therein and against said commandant, expressly finding and holding that the lands embraced in said Survey 569 were not a part of Mare Island and were not owned by the United States, but on the contrary the plaintiffs in said action were the owners thereof as the successors in interest of the State of California, as the grantee of the United States under the grant made by said Swamp Land Act. The United States, in the name of said Irwin but at its own expense and on its own behalf, prose-

cuted an appeal from said judgment to the Supreme Court of the United States and on February 3, 1890 said judgment was affirmed by said court.

VI.

From the affirmance of said judgment until the commencement of this action said judgment was and has been accepted by the United States and by the State of California and by all persons interested in said lands as conclusively establishing that none of said Survey 569 was owned by the United States, and until the commencement of this action on the 22nd day of April, 1930, the United States asserted no claim to any right or interest in said lands. [142]

VII.

Following the affirmance of said judgment one L. E. Cross purchased for a valuable consideration the lands included in said Survey 569 and thereupon took possession of the same and in the year 1896 commenced the reclamation of the portion of said Survey 569 nearest Mare Island by the construction of extensive levees and drainage works. Preliminary to the construction of said levees and drainage works the then commandant of the Mare Island Navy Yard and said Cross jointly caused a survey to be made for the purpose of determining the southeasterly boundary line of said Survey 569 in order that said Cross might construct a levee along said line and such levee was thereupon constructed by said Cross. Said levees and drainage

works were completed by said Cross on or before the year 1899 at an expense of many thousands of dollars and said Cross thereupon built roads and erected farm houses and other farm buildings on said Survey and commenced the farming and cultivation of a large part of the same, and such farming and cultivation by said Cross and his successors in interest has continued until the present time.

That portions of said Survey not cultivated were, following the affirmance of said judgment, improved at very considerable expense by certain defendants in this action or their predecessors in interest as wild duck preserves by the construction of levees, the making of ponds and the construction of roads and buildings.

That in 1926 and subsequent to the issuance by the United States of patents to the State of California for all of said Survey 569, the defendant Sears Point Toll Road Co. constructed a public toll road across said Survey 569 at an expense likewise [143] in excess of many thousands of dollars.

That ever since the predecessors in interest of said defendants took possession of said lands following the affirmance of said judgment against said Irwin, they and their successors in interest have had the open, visible, exclusive and undisturbed possession of said Survey 569.

VIII.

Following the affirmance on February 3, 1890 of said judgment against said Irwin, the United

States on June 5, 1896 patented to the State of California all those portions of said Survey 569 lying in Township 3 North, Range 5 West, M. D. B. & M., and on February 7, 1910 patented to the State of California all those portions of Survey 569 lying in Township 4 North, Range 5 West, M. D. B. & M., said patents being the patents referred to in the Bill herein as Swamp Land Patents Nos. 72 and 152, respectively. The lands so patented are the portions of said Survey 569 most remote from said Mare Island, the nearest point of the same being approximately five miles therefrom.

Thereafter application was made for the issuance of a patent to the State of California for the balance of said Survey 569, to-wit: those portions of said Survey lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. Upon said application being made, the Secretary of the Interior, under date of October 18, 1912, addressed a letter to the Secretary of the Navy requesting of him such data as might be in the latter's possession relative to the limits of the lands embraced in Mare Island, to the end that the matter of segregating from Mare Island swamp and overflowed lands granted to the State of California might be considered. Under date of February 1, 1913, the [144] Acting Secretary of the Navy replied by letter to the Secretary of the Interior calling attention to the judgment in the action of ejectment against John Irwin hereinbefore mentioned, holding that the lands embraced within said Survey 569 were not a part of

Mare Island, and with said letter forwarded to the Secretary of the Interior a map or plat showing the limits of Mare Island and showing as the northwesterly boundary line thereof the southeasterly boundary line of said Survey 569.

Thereafter and on November 10, 1913, pursuant to an Act of the Legislature of the State of California passed in 1897, ceding to the United States the exclusive jurisdiction of all lands within the State of California held, occupied or reserved by the United States for military purposes or defense, the United States filed and recorded in the office of the County Recorder of the County of Solano a map showing the boundaries of said Mare Island Reservation and upon said map the northwesterly boundary line of said Reservation is shown as the southeasterly boundary line of said Survey 569.

Thereafter the Department of the Interior directed that appropriate surveys be made of said Townships 3 and 4 North, Range 4 West, M. D. B. & M., for the purpose of segregating the swamp and overflowed lands therein granted to the State of California by said Swamp Land Act, and directed that such surveys should be limited to the lands in said townships lying to the north and west of said southeasterly boundary line of said Survey 569. Such surveys were made and approved and the Secretary of the Navy having been again consulted by the Secretary of the Interior as to lands claimed by the United States and being advised by the latter by letter under date of June 4, 1923 that all of the lands lying within said Survey 569 had

been lost to the [145] United States by reason of the judgment in said ejectment action, the Secretary of the Interior ordered all of the lands within said Survey 569 not theretofore patented to the State, to-wit: the lands in said Survey lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M., to be patented to the State of California, and pursuant to said order said lands were by the United States patented to the State of California by the patent referred to in the Bill herein dated April 26, 1924 and numbered 937055.

IX.

This defendant prior to the commencement of this action purchased for valuable consideration from the successors in interest of the State of California the land alleged in the answer of this defendant to be owned by him, doing so subsequently to the issuance by the United States of its patent to the State of California for said land and in reliance upon said patent.

X.

That by reason of the foregoing facts the United States is estopped in equity and good conscience from asserting as against this defendant that any part of said Survey 569 is a part of Mare Island or that it has any right or title thereto.

W. H. SPAULDING,
STONEY, ROULEAU,
STONEY & PALMER,
Solicitors for Answering Defendant.

[Endorsed]: Filed Jun. 15, 1937. [146]

[Title of District Court and Cause.]

ORDER FOR SUBSTITUTION OF META S. HEALY AS PARTY DEFENDANT IN THE PLACE AND STEAD OF W. H. HEALY, DECEASED.

The Complainant's Petition for Substitution of Meta S. Healy, as party defendant in the place and stead of W. H. Healy, Deceased, coming regularly on for hearing, the Complainant appearing by its Attorneys, H. H. McPike, United States Attorney for the Northern District of California, and Esther B. Phillips, Assistant United States Attorney, and Meta S. Healy appearing by her Attorneys, Messrs. Stoney, Rouleau, Stoney & Palmer, and, it appearing to the Court that the defendant, W. H. Healy, died on August 11, 1931, and that thereaffer proceedings were duly had in the matter of his estate in the Superior Court of the State of California, in and for the City and County of San Francisco, and that on July 28, 1932, a final decree of distribution was rendered in said estate by said Superior Court, and that by said final decree of distribution, all the right, title and interest claimed by said W. H. Healy, deceased, in the lands described [147] in Complainant's Bill of Complaint was distributed to Meta S. Healy as residuary legatee, and it

Further appearing that there is no opposition to said Petition for Substitution,

It is hereby Ordered, Adjudged and Decreed that Meta S. Healy be substituted as party defendant in the place and stead of W. H. Healy, deceased.

Dated: April 20, 1936.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Apr. 20, 1936. [148]

[Title of District Court and Cause.]

ORDER DISMISSING CAUSE AS TO DEFENDANTS RUSS INVESTMENT COMPANY, HENRY A. KENDAL, JOSEPH DUBEAULT, WILFRID DUBEAULT AND CHARLES J. MONAHAN AND AS TO CERTAIN LANDS.

The parties having so stipulated, and good cause appearing therefor:

It is hereby ordered, adjudged and decreed that the [149] above-entitled cause be and the same is hereby dismissed, with prejudice, as to defendants Russ Investment Company (sued herein as Russ Investment Co.), Henry A. Kendal (sued herein as Henry A. Kendall), Joseph Dubeault, Wilfrid Dubeault (sued herein as Wilfred Dubeault) and Charles J. Monahan.

It is further ordered, adjudged and decreed that the above-entitled cause be and the same is hereby dismissed, with prejudice, as to all of the lands described in the Amended Bill of Complaint, lying to the north and east of South Slough, also known as Navy Yard Slough, owned or claimed by the forgoing defendants or any of them, including in

particular (but by this particular mention not limiting the breadth or scope of the foregoing description), the following described parcels, to wit:

(1) All that certain piece or parcel of land situate, lying and being in part in the County of Napa and in part in the County of Solano, State of California, described as follows:

Bounded on the north by the north line of Sections 32, 33 and 34 of Township 4 North, Range 4 West, Mt. Diablo Base and Meridian; bounded on the east by Napa Straits (also known as Napa River); and bounded on the south and west by the center line of China Slough from the North line of said Section 32 to its confluence with Navy Yard Slough (also called South Slough), and thence by the center line of said Navy Yard Slough to said Napa Straits; said parcel of land being a portion of the land included in Swamp and Overflowed Land Survey No. 569, Solano County Series, and lying in Sections 32, 33 and 34 in Township 4 North, Range 4 West, and in Sections 3 and 4 West, Mount Diablo Base and Meridian.

(2) All that certain piece or parcel of land situate, lying and being in part in the County of Napa and in part in the County of Solano, State of California, more particularly described as follows:

A tract of land bounded on the north by the center line of China Slough and by lands conveyed to David T. Hanbury by A. L. Scott and

Lillian R. Scott, his wife, by deed dated December 3, 1904, and recorded in the office of the County Recorder of said County of Napa, in Book 80 of Deeds, at page 237; on the east by said center line of said China Slough and on [150] the South and West by the center line of South Slough (also called Navy Yard Slough; containing 600 acres more or less and being situated in Sections 31, 32 and 33, Township 4 North, Range 4 West, and Section 5, Township 3 North, Range 4 West, Mount Diablo Base and Meridian, and being a portion of the lands embraced within Swamp and Overflowed Lands Survey No. 569, Solano County Series, patented by the State of California by patent dated April 7, 1874, and recorded May 1, 1874, in the office of the County Recorder of said County of Solano, in Book 3 of Patents, page 301.

Done in open Court this 9 day of April, 1937.

A. F. ST. SURE,
United States District Judge.

Approved as to form
H. H. McPIKE,
United States Attorney.
ESTHER B. PHILLIPS,
Ass't U. S. Atty.

[Endorsed]: Filed Apr. 9, 1937. [151]

[Title of District Court and Cause.]

ORDER DISMISSING CAUSE AS TO DEFENDANT META S. HEALY AND AS TO CERTAIN LAND.

The parties having so stipulated, and good cause appearing therefor, it is hereby ordered that the above-entitled cause be and the same is hereby dismissed with prejudice as to Meta S. Healy.

It is further ordered that the above-entitled cause be and the same is hereby dismissed with prejudice as to the following described parcel of land:

Commencing at a point on the east bank of Napa Slough which is also the beginning point of the description of Swamp and Overflowed Land Survey No. 115, and which bears west 16.00 chains from the ¼ corner in the south line of Section 25, Township 4 North, Range 5, West, M. D. M., in Napa County, California; running thence with the meander line of said Swamp and Overflowed Land Survey No. 115, following the said east bank of said Napa Slough on the same courses and distances as those given in said Swamp and Overflowed Land Survey No. 115, as follows: North 40° East 13.00 chains; North 0° 30′ East 10.50 chains; north 19° 15′ West 27.75 chains; north 15° 15′ West 51.30 chains to the mouth of a slough running through Little Island and also to the north or exterior line of a borrow canal from which a levee has been thrown up north of

the said Canal; thence following the north or exterior line of the said canal, so as to [152] include the canal in the property herein described, easterly and southeasterly, 110 chains, more or less, to the north bank of China Slough; thence following the north bank of said China Slough and the north bank of South Slough in a southwesterly and westerly direction 53 chains, more or less, to the south turn in South Slough; thence following the west bank of said South Slough in a southerly direction 76 chains, more or less, to the north turn of said South Slough at the extreme end of Little Island,—thence following the east bank of said South Slough, in a northerly direction 30 chains more or less, to the point of commencement.

Being a portion of Swamp and Overflowed Land Survey No. 115 and a portion of Swamp and Overflowed Land Survey No. 569, and containing 330 acres.

Dated: May 26, 1937.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed May 26, 1937. [153]

[Title of District Court and Cause.]

STIPULATION AS TO CLAIM OF DEFENDANT PACIFIC GAS AND ELECTRIC COMPANY

It is hereby stipulated and agreed that defendant Pacific Gas and Electric Company shall be deemed to have filed an answer to the Amended Bill of Complaint and amendments thereto, claiming ownership of a right of way and easement for transmission line purposes over the lands claimed by defendants James Irvine, Mary W. Stewart, Bay Land Company, Field and Tule Land Company and West End Land Company under and by virtue of a right of way deed from Lester E. Cross to Pacific Gas and Electric Company dated May 8, 1911 and recorded in the office of the County Recorder of the County of Napa, State of California, on May 15, 1911, in Volume 100 of Deeds at page 286, and also recorded in the office of the County Recorder of the County of Solano, State of California, on May 26, 1911 in Liber 192 of Deeds at page 53.

It is further stipulated and agreed that ever since 1914 defendant Pacific Gas and Electric Company has been in the actual, open, notorious and adverse possession and use of said right of way and easement, having theretofore constructed an electric transmission tower line thereon, and that whatever title or interest was granted to the State of California by the [154] Swamp Land Act of 1850 in or to the lands covered by said right of way

and easement was, on May 8, 1911, vested in said Lester E. Cross, and that defendant Pacific Gas and Electric Company is now the owner of the right of way and easement intended to be granted by said right of way deed of May 8, 1911 insofar as the State of California or any of its successors in interest owned said right of way and easement or was entitled to grant or convey the same; it being expressly understood, however, that complainant does not concede but expressly denies that either the State of California or any of its successors in interest ever had or now has any title or interest in or to said right of way and easement or in or to the lands covered thereby.

Dated August 29, 1939.

FRANK J. HENNESSY,
United States Attorney.
ROBERT L. McWILLIAMS,
Assistant United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Complainant.

THOS. J. STRAUB,
J. C. WOOD,
Attorneys for defendant Pacific Gas and Electric Company.

STONEY, ROULEAU,
STONEY & PALMER,
W. H. SPAULDING,
Attorneys for defendant
James Irvine.
HENRY E. MONROE,
J. M. MANNON,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company and West End Land Company.

It is so ordered.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Aug. 30, 1939. [155]

[Title of District Court and Cause.]

STIPULATION FOR VIEW OF PREMISES

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the Court may, at its convenience and without the presence of counsel or any representative of any of the parties, view the lands and premises which are the subject of the above entitled action.

San Francisco, California, August 15, 1939.

FRANK J. HENNESSY,
By E. B. P.,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Plaintiff.

HENRY E. MONROE,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for Defendants Mary W. [156] Stewart, Sears Point Toll Road Co., a corporation, American Trust Company, a corporation, Bay Land Company, a corporation, Field and Tule Land Company, a corporation, and West End Land Company, a corporation.

W. H. SPAULDING,
STONEY, ROULEAU, STONEY & PALMER,
Attorneys for defendant James Irvine.

[Endorsed]: Filed Aug. 16, 1939. [157]

[Title of District Court and Cause.]

Frank J. Hennessy
United States Attorney

Esther B. Phillips
Assistant United States Attorney
Post Office Building
San Francisco, California;

John L. Wheeler
Special Attorney, Department of Justice

Oscar Provost
Special Assistant to the Attorney General

Philip Buettner
Attorney, Office of Judge Advocate General of the Navy
Washington, D. C.;
Attorneys for Complainant.

Henry E. Monroe
Warren Olney, Jr.
J. M. Mannon, Jr.
A. Crawford Greene
Robert L. Lipman
Warren Olney III
San Francisco, California
Solicitors for Defendants Mary W. Stewart, Sears Point Toll Road Company, Bay Land Company, Field and Tule Land Company and West End Land Company.

W. H. Spaulding
Stoney, Rouleau, Stoney & Palmer
San Francisco, California
Solicitors for Defendant James Irvine.

McCutchen, Olney, Mannon & Greene
San Francisco, California
Of Counsel. [158]

OPINION

St. Sure, District Judge:

This is a suit brought by the Government to cancel three patents issued to the State of California, and to quiet title to 7,413.48 acres of land claimed to be a part of Mare Island in San Francisco Bay.

"The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. The United States claims under deed to it in 1853 by Bissell and Aspinwall and another, who derived their title under grant of May 20, 1841, by Alvarado, Mexican Governor of California, to Castro, a Mexican citizen, of the island La Yegua (Mare Island) 'in all its extent.'" Defendants claim under three patents issued by California in 1874, in 1896, and in 1910 respectively, "purporting to convey the land in question as a part of the swamp or overflowed lands granted to the state by the Swamp Lands Act of Congress,

Sept. 28, 1850, c. 84, 9 Stat. 519," hereinafter called the Swamp Lands Act. The quoted language is from United States v. O'Donnell, 303 U. S. 501, 504, showing a common source of title beginning with the Treaty of Guadalupe Hidalgo to lands involved in the O'Donnell case and those in suit here, but there is no other pertinent similarity between the cases.

The lands in the O'Donnell case were within swamp and overflowed land survey No. 34 containing 164.55 acres, which this court found the United States was the owner of and ever since 1853 had occupied [159] for military purposes in connection with a naval station and Navy Yard; that the possession of the United States had at all times been actual, open, adverse, and exclusive; that the value of the buildings, structures, and utilities placed upon the land by the Government exceeded $1,250,000.

In the O'Donnell case the defendants "specifically challenged the existence and validity of the Castro grant, the validity of the decrees of confirmation of the title of Bissell and Aspinwall, and any prescriptive title of the United States. * * * The trial court made findings of fact and reached conclusions of law in favor of the United States on all these issues. Upon appeal, the Court of Appeals for the Ninth Circuit reversed and decreed 'that the United States has no title to the patented lands in suit, and that the title is in and quieted in' respondents. 91 F. (2) 14." United States v. O'Donnell, supra. The

Supreme Court reversed the Circuit Court of Appeals, thereby finally settling the question as to the validity of the Castro grant and establishing the title of the United States to the lands in survey 34.

The lands in the present case are within swamp land survey No. 569 containing, as we have seen, upwards of seven thousand acres northwest of the Island.

In its complaint the Government alleges that the United States "is the owner of and has since the year 1853, occupied as part of the Mare Island Navy Yard Reservation for public, to-wit: military and naval purposes, and has been in possession" of the lands in controversy. Having in the O'Donnell case quieted title [160] to the lands within survey 34, the Government now claims that the adjoining lands in survey 569 are a physical part of the "Mare Island granted by the Mexican Government to Castro, purchased by the United States from Bissell and Aspinwall, assignees of Castro and set apart for a naval reservation by Executive Order of the President of the United States."(1)

To sustain its case, the Government relies upon the Castro grant, the decree of the Board of Land Commissioners in Bissell and Aspinwall v. United States, 30 Fed. Cases page 1232, and deed from Bissell and Aspinwall to the United States, the Freeman survey made in conformity with the Act of March 3, 1851, and said Executive Order. The Gov-

(1) Brief for the United States, page 4.

ernment contends that the Freeman survey "is conclusive in determining the delineation of Mare Island in the instant case." In addition to this survey, many maps, plats, drawings, and documents were introduced in evidence in support of the Government's theory that the lands in survey 569 are part and parcel of the lands comprising survey 34 and the upland of what is commonly known as Mare Island upon which the buildings of the Navy Yard are located. The evidence is interesting but without convincing force in the face of the facts opposed to it. In other words, the Government has failed to sustain the burden of proof resting upon it.

It appearing that the lands in suit were not originally a part of Mare Island and were not embraced in the Castro grant, the reservation for naval purposes [161] does not apply to them, and the attack upon the patents fails.

Defendants have set up in their answers affirmative defenses of (1) the statute of limitations, (2) establishment and recognition of a boundary line between surveys 34 and 569, and (3) equitable estoppel.

Defendants Mary W. Stewart et al. plead that as to two of the patents, swamp land patent No. 72 and swamp land patent No. 152, the suit is barred by Sec. 8 of the Act of March 3, 1891, which provides that "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such

patents.'"[2] Patent No. 72 was issued on June 5, 1896, and patent No. 152 on February 7, 1910. The suit was commenced April 22, 1930. One patent was issued thirty-four years before suit, and the other twenty years before. Clearly, as to the lands covered by the two patents, the suit is barred by the six-year statute of limitations. The case of United States v. Chandler-Dunbar Water Power Company, 209 U. S. 447, is directly in point, and is conclusive.

In the light of the following facts, which I think present an insuperable obstacle to the Government's case, it is unnecessary to discuss the legal phases of the second and third defenses:

1. The lands in suit prior to reclamation by the defendants and their predecessors in interest were swamp and overflowed lands within the provisions of the Swamp Lands Act through which title passed to the State of California. [162]

2. The lands were surveyed in the year 1869 under the authority of the State, and are identified by said survey as survey No. 569 and as containing 7,413.48 acres; thereafter, on April 7, 1874, the State issued its patent conveying all of the lands to John W. Pearson.

3. Patents No. 72 and No. 152 were issued to the State of California by the United States under the provisions of Swamp Lands Act on June 5, 1896, and February 7, 1910, respectively; also on April 26, 1924, a patent, No. 937055, was issued to the

(2) Sec. 8 of the Act of March 3, 1891; 26 Stats. 1099; Title 43 USCA Sec. 1166.

State by the Government under the provision of the Swamp Lands Act. A portion of the lands in suit are included in these patents.

4. For more than fifty years last past the lands in suit have been in the actual, open, and exclusive possession of the defendants and their respective predecessors in interest.

5. In 1883 a suit was brought in the Superior Court of Solano County, State of California, afterwards removed into the United States Circuit Court, to recover possession of the very lands in suit. The title of the case is The San Francisco Savings Union, The Bank of California, and George A. Nourse, plaintiffs, v. John Irwin, defendant. The trial was held before Honorable Stephen J. Field, Associate Justice of the United States Supreme Court, sitting as a Circuit Judge, and Circuit Judge Lorenzo Sawyer. The court found all of the issues in favor of plaintiffs and caused judgment to be entered thereon in their favor for the [163] possession of the premises in controversy. The opinion was written by Mr. Justice Field, and may be found in Volume 28 of the Federal Reporter, beginning at page 708.(3) The holding of the

(3) Read in connection with present litigation, the following excerpt from Mr. Justice Field's opinion is significant:

"From the date of that conveyance [Bissell and Aspinwall deed], the United States have been in possession of the island, and have constructed there large and expensive buildings for the uses of the navy, including a navy-yard. They have also oc-

Circuit Court in the Irwin case is an important fact in this litigation. Defendant Irwin was the officer in command of the Navy Yard at the time. The United States was the real party interested as defendant. Irwin was represented by [164] United States Attorney S. G. Hilborn, and A. L. Rhodes, whose appointment as Special Assistant United States Attorney in the case, was authorized by the Attorney General. On appeal to the United States

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casionally asserted ownership over the adjacent overflowed lands, but the acts done by them were not of a character to indicate any settled purpose of occupying the lands, or devoting them to any public uses. They have not constructed any levees to prevent their overflow, or made any efforts to reclaim the lands, or to subject them to any uses of the government. Two shanties, 10 by 12, erected in 1874 or 1875 on the lands nearly eight miles distant from the island, were soon abandoned, and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands, if done by a private party, would not bar the plaintiffs from asserting their right of possession. There was on their part no such possession as would set the statute of limitations running, and which in time might ripen into a title against the true owners. It was not open, exclusive, and continuous, such as to give notice to the owners of an intention to claim title adversely to them; and the testimony indicates that the plaintiffs were ignorant of any adverse claim on the part of the United States till a short time before the commencement of this suit. It was not accompanied by any of the ordinary acts indicating ownership, and at no time were any such acts done except in the instance mentioned, where the two shanties were constructed, but soon afterwards abandoned."

Supreme Court the Government's interests were represented by Assistant Attorney General Maury. The judgment of the Circuit Court was affirmed, as appears in Irwin v. San Francisco Savings Union, 136 U. S. 578.

6. On December 3, 1873, the Board of Supervisors of the County of Solano established Reclamation District No. 186, which included the lands in suit.

7. In 1897 L. E. Cross began the erection of levees around the lands (survey 569) thereafter also known as Island No. 1 and Cross Island. Before commencing the work, Cross advised the Commandant of the Navy Yard of his intention to reclaim, and apparently the Government consented.(4) The lands were reclaimed [165] at an expense of $80,300, and thereafter used for agricultural purposes and the raising and pasturing of stock.

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(4) The following letters were exchanged between Cross and the Commandant of the Navy Yard relative to the reclamation of the lands:

"Stockton, Cal., Dec. 5th, 1896.

"Sir:

"I intend within the next thirty days to begin the reclamation of the tule land north of the Government boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Depmt to do the work for me, which he refuses to do without your knowledge

8. George Cross, son of L. E. Cross, lived upon the lands, farming them for his father from 1898 to 1907. Since the decision in the Irwin case the southeasterly line of survey 569 has been recognized as the northwesterly limit of the Mare Island reservation.(5) In 1914 the Government erected and has

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and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine.

"Very respectfully,

"L. E. Cross.

"To Admiral W. A. Kirkland

"Commandant Mare Island Navy Yard."

Admiral Kirkland replied:

"In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein."

(5) In response to inquiries from the First Assistant Secretary of the Interior relative to the limits of Mare Island, the First Assistant Secretary of the Navy replied on February 1, 1913, in part as follows:

"Originally all of the tule land adjoining and to the north of Mare Island was claimed as a part of Mare Island. This tule land had, however, been sold to the State and the question as to the ownership of about 7,413 acres was taken to court and Justice Field decided in the case of San Francisco Savings Union and others v.

since [166] maintained the present boundary line fence.

9. On March 2, 1897, California passed an act (California Stats. 1897, p. 51) ceding to the United States exclusive jurisdiction over all lands within the State then held, occupied, or reserved by the United States for military purposes or defense, or that might hereafter be ceded or conveyed to the United States for such purposes, provided that a sufficient description by metes and bounds upon map or plan of such lands be filed in the proper office of record in the county in which the same were located. Pursuant to this Act the Government recorded in the office of the County Recorder of Solano County a map of the Mare Island Navy

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Irwin in the Circuit Court, District of California, July 8, 1886, that title to the land in question rested with individuals who had purchased it from the State (see 28 Fed. 708). All of the land originally claimed as Mare Island coming in township 4 North, range 4 West, Mount Diablo Meridian, was covered by this decision. This decision was afterwards confirmed by the Supreme Court of the United States. See 136 U. S. 578.

"There is forwarded herewith blueprint of Plan R-212 which shows the present limits of Mare Island."

On August 17, 1923, First Assistant Secretary of Interior Finney gave an opinion that the title to the property comprised by swamp land survey No. 569, embracing all the lands north of survey No. 34, was lost to the United States by the decision in Irwin v. San Francisco Savings Union, 136 U. S. 578, and that all of the swamp lands in that area should be patented to the state.

Yard reservation on November 10, 1913, in Book 5 of Maps, page 4. Upon this map the northwesterly boundary of the reservation is shown as the southeasterly line of survey 569.

10. In 1926 defendant Sears Point Toll Road Co. constructed a public toll road across survey 569. The road was in course of construction for two years, is 7.3 miles long, and cost $180,000. Since the road was built a number of franchises have been granted to the Company.

11. Defendant West End Land Company paid $27,000 for its land in 1923, and has expended $25,000 in improvements. Defendant Field & Tule Land Company bought 500 acres twenty years ago, paying $25 to $35 per acre. Its improvements cost in excess of $22,500. Defendant James Irvine purchased lands in 1928 for which he paid $100,000 and in addition spent $26,000 on improvements. [167]

12. For fifty-seven years all of the lands in suit have been taxed by the State and its political subdivisions. Since the Irwin decision in 1890 a number of civil actions have been brought and prosecuted in the courts of California, pertaining to the lands in controversy.

In addition to the facts enumerated above, there are more to the same effect that might be mentioned. All are undisputed, and in their nature indisputable. They cannot be explained away or overcome. They show that for half a century the defendants and their predecessors in interest have been in the open, exclusive, continuous possession

of the lands in survey 569. The lands have been reclaimed, homes have been built upon them, and they have been farmed and used for other useful purposes. People have lived upon the lands, and like other California citizens and residents, they have performed civic duties and exercised political privileges. These facts, in my opinion, preclude the Government from ever establishing its claim to ownership and possession of the lands in suit.

I therefore find and conclude that this suit is barred by the statute of limitations as to the lands in swamp land patents 72 and 152; that the lands in suit embraced in survey 569 are not a part of Mare Island; that the United States has no title in the lands in suit, but that the title to them is in the defendants, who are entitled to a decree quieting their title.

Dated: August 24, 1939. [168]

[Title of District Court and Cause.]

ORDER OF RULINGS ON EVIDENCE OFFERED AT TRIAL AND FOR JUDGMENT

I.

During the trial of the above-entitled case certain evidence was admitted by the court subject to the objection of the parties, the court reserving its ruling in each instance. As to such reservations it is now Ordered:

1. That the objection of the Government to defendants' offer of the judgment roll in Bouldin v. Phelps, 30 F. 547, is Sustained and exception noted (Trans. Vol. 4, page 226).

2. That the objection of the Government to defendants' offer of the certified copy of Judge Rhodes' appointment as Special Assistant Attorney for the United States in the Bouldin case is Sustained and exception noted (Trans. 4, 226).

3. That the Government's objection to defendants' offer of the judgment roll in San Francisco Savings Union v. Irwin, 28 F. 708, is Overruled and exception noted (Trans. 4, 228).

4. That the Government's objection to [169] defendants' offer of a certified copy of the appointment of Judge Rhodes as Special Assistant United States Attorney in the Irwin case is Overruled and exception noted (Trans. 4, 228).

5. That the Government's objection to defendants' offer of a letter from the file in the Irwin case by Acting Attorney General Jenks to Judge Rhodes, ordering him to sue out a writ of error in the Irwin case is Overruled and exception noted (Trans. 4, 228). The Government's motion to strike the letter as read in evidence is Denied and exception noted (Trans. 4, 230).

6. That the Government's objections to the testimony of E. D. Butler, John B. Coleman, Olga D. Sievert, Myford Irvine, and George Cross, offered by defendants, are Overruled and exception noted (Trans. 4, 235-244).

7. That the Government's objection to defendants' offer of letter from files of the Navy Yard from L. E. Cross to Admiral Kirkland, Commandant, is Overruled and exception noted; that Government's objection to letter of Admiral Kirkland in reply to Mr. Cross's letter is Overruled and exception noted; Government's motion to strike is Denied and exception noted (Trans. 4, 244-246).

8. That the Government's objection to defendants' offer of certified copy of letter of October 18, 1912, from First Assistant Secretary of Interior to Secretary of Navy is Overruled and exception noted; that Government's objection to defendants' offer of letter in reply, dated February 1, 1913, is Overruled and exception noted (Trans. 4, 247-249).

[170]

9. That Government's objection to defendants' offer of blueprint R-212 is Overruled and exception noted (Trans. 4, 250).

10. That the following objections by the Government to defendants' offers of evidence are each Sustained and exceptions noted, towit: Letter of July 25, 1879, from Acting Commissioner of the General Land Office to the Surveyor General in San Francisco; letter of August 7, 1879, from Acting Commissioner to Surveyor General; letter of August 7, 1879, from Surveyor General to Acting Commissioner; Hanley protests of July 5, 1879, and July 16, 1879; letter of February 28, 1921, to the Surveyor General in San Francisco from Acting Commissioner (Trans. 4, 251-256).

11. That the objections of the Government to defendants' offers of letter of August 17, 1923, decision 28814, and letter of September 19, 1923, from Assistant Commissioner to Surveyor General, San Francisco, are Overruled and exceptions noted (Trans. 4, 257).

12. That the objection of the Government to defendants' offer of testimony of Mr. Stewart is Overruled and exception noted (Trans. 4, 259).

13. That the objection of the Government to defendants' offer of testimony of W. C. Heyer is Overruled and exception noted.

14. For the purpose of completing the record, in the event that the court has overlooked any objections of the Government to any evidence offered by [171] defendants, it is Further Ordered that such objections are Overruled and exceptions noted.

II.

It is Ordered that the complainant take nothing by its suit, and that defendants have judgment as prayed for in their several answers.

Counsel for defendants may submit findings of fact and conclusions of law in accordance with the views expressed in opinion filed herewith.

Dated: August 24, 1939.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Aug. 24, 1939. [172]

[Title of District Court and Cause.]

ORDER ALLOWING TIME TO COMPLAINANT TO FILE OBJECTIONS TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It is Hereby Ordered that the Complainant may have to and including October 15, 1939, in which to lodge objections to the Findings of Fact and Conclusions of Law proposed by defendants.

Dated: September 11, 1939.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Nov. 1, 1939. [173]

[Title of District Court and Cause.]

COMPLAINANT'S OBJECTIONS TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes complainant and with leave of court proposes its objections to the findings of fact and conclusions of law heretofore proposed by defendants, as follows:

1.

Complainant objects to Paragraph No. 1 on pages 3 to 5 and asks that it be stricken for the reason that it is not supported by and is contrary to the

evidence. Complainant further objects to that part of Paragraph No. 1 on page 4 beginning at line 20, to-wit:

> That at no time subsequent to September 28, 1850 has complainant ever occupied said lands or any thereof, either as a part of the Mare Island Navy Yard Reservation, or for public or military or naval purposes or otherwise or at all, and that at no time since September 28, 1850 has complainant ever been in the possession of or entitled to the possession of said lands or any part thereof. That for forty years last past the said defendants owning, severally, those portions of said lands described in Subdivision II of the Amended Bill of Complaint as above stated and their respective predecessors in interest (other than complainant) have been in and entitled to the possession of said lands so owned by them as aforesaid and their said possession of said lands has at all times been actual, open, notorious, under claim of right and under color of title and adverse to the complainant and to the whole world.

and asks that it be stricken for the reason that it sets forth erroneous conclusions of law and is irrelevant and immaterial. [174]

2. . .

Complainant objects to Paragraph No. 3 on page 5 and asks that it be stricken for the reason

that it is not supported by and is contrary to the evidence.

3.

Complainant objects to Paragraph 5 on pages 6 and 7 and asks that it be stricken for the reason that it is not supported by and is contrary to the evidence and is contrary to the findings of fact of this Court in the case of United States v. O'Donnell, et al., which findings, delineating the lands which constitute Mare Island, were made upon substantially the same evidence as in this case. Complainant further objects to that part of Paragraph No. 5 on page 7 beginning at line 13 as follows:

> That a large portion of the lands owned by defendant James Irvine as described and set forth in Exhibit A hereto lies to the east and northeast of Dutchman's Slough, also known as Boat Cut-off; that said portion of said lands is more particularly shown upon the map attached to the answer of defendant James Irvine as Exhibit B thereto; that said Dutchman's Slough or Boat Cut-off is and ever since prior to the year 1841 has been a natural navigable body of water, cutting off all of said lands lying to the east and northeast thereof from all of the remaining lands described in Exhibit A hereto and all of the lands lying within said Mare Island Navy Yard Reservation.

and asks that it be stricken for the reason that it sets forth an erroneous conclusion of law and is irrelevant and immaterial.

4.

Complainant objects to that part of Paragraph No. 6 commencing at line 6 on page 8 as follows:

That neither the said survey nor the said plat so made and prepared by said Freeman was ever approved, either expressly or impliedly, by the Surveyor General of California, either as required by said Land Commission Act or by said Act of July 1, 1864 or otherwise or at all. That copies of said survey and said plat were thereafter transmitted by the Surveyor General of California to the Commissioner of the General Land Office. That neither the said survey nor the said plat was ever approved, either expressly or impliedly, by the Commissioner of the [175] General Land Office, either as required by said Land Commission Act or by said Act of July 1, 1864 or otherwise or at all, and neither said survey nor said plat was ever used or acted upon by the Commissioner of the General Land Office as an approved survey or as an approved plat. That neither the said survey nor the said plat was ever approved, either expressly or impliedly, by the Secretary of the Interior, either as required by said Land Commission Act or by said Act of July 1, 1864 or otherwise or at all, and neither said survey nor said plat was ever used or acted upon by the Secretary of the Interior as an approved survey or as an approved plat. That neither the said survey nor the said

plat has ever been approved as required by law or otherwise. That a large part, but not all, of the lands described in Subdivision II of the Amended Bill of Complaint are embraced within the exterior limits of said survey.

and asks that it be stricken for the reason that it is not supported by and is contrary to the evidence, sets forth an erroneous conclusion of law, and is contrary to the findings of fact of this Court in the case of United States v. O'Donnell, et al., in which this Court found upon the same evidence that the Freeman survey was approved in all respects, employing in said finding the following words and figures:

In July, 1877, the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California", approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to-wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the

survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on said survey and plat. [176]

5.

Complainant objects to those parts of Paragraphs Nos. 7 and 8 on page 9 beginning at line 4, and line 18, to-wit, "That none of the lands described in Subdivision II of the amended bill of complaint was included or embraced within the lands so exempted and reserved and none of said land was exempted or reserved from the sale by said execu-

tive order or was subject to reservation at any time subsequent to September 28, 1850", and asks that the parts of Paragraphs 7 and 8 quoted above be stricken for the reason that they are not supported by and are contrary to the evidence, set forth erroneous conclusions of law, and are contrary to the finding of this Court in the case of United States v. O'Donnell, et al., to-wit:

> * * * It is not true that Exhibit "K" referred to and incorporated in said Answer (or plaintiff's Exhibit "L-16" in Evidence), is the survey of the Board of Officers sent to California to select a site for a Navy Yard nor is the only part conveyed and made part of said Mare Island by Bissell, Aspinwall and McArthur. That said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island. The survey referred to in said conveyance and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay. It is not true that Exhibit "K" (the Cutt's detailed drawing, so-called) is the controlling description of the conveyance from Bissell and Aspinwall to the United States nor that said survey follows the water's edge or the natural boundaries of Mare Island throughout their entire extent or embraces the entire area of Mare Island or all of the lands that were granted to Victor Castro and by him conveyed to the predecessor in title

to the United States. It is not true that the Navy Yard plan attached to said exhibit also shows the area of Mare Island or the southerly line of said Survey No. 34, nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

6.

Complainant objects to that part of Paragraph No. 9 on pages 9 and 10 beginning at line 10 on page 10, to-wit: "That each of said patents is in all respects valid and in full force and effect", and asks that that part quoted above be stricken for the reason that it is not supported by and is contrary to the evidence, and for the further reason that it sets forth an erroneous conclusion of law. [177]

In line 12 on page 10 the second "of" should be deleted and "claimed by" be inserted in lieu thereof; in line 14 of page 10 of the second "of" should be deleted and "claimed by" inserted in lieu thereof; in line 16 of the first "of" should be deleted and "claimed by" be inserted in lieu thereof.

7.

Complainant objects to Paragraph 10, and paragraphs (a), (b), (c) and (d) thereunder, on pages 10 to 18, for the reasons that they set forth erroneous conclusions of law, and are irrelevant and immaterial. Complainant further objects to that part of Paragraph 10, commencing at line 20, on page 11, to-wit:

> said filing being a map showing the boundaries of said Mare Island Reservation;

that part commencing at line 23 on page 11, to-wit:

> That none of the lands described or referred to in Subdivision II of the Amended Bill of Complaint was a part of said Mare Island so reserved or was held or occupied or reserved by the United States for military purposes or defense or was included or embraced within the description of said Mare Island Reservation or map thereof recorded by the United States as found above, nor was jurisdiction over any of said lands ceded by the State of California to the United States;

that part of paragraph 10 commencing at line 5 on page 12, to-wit:

> That beginning in the year 1890 and consistently ever since (except for the filing of this action on April 22, 1930) the United States has recognized that the northwesterly boundary of said Mare Island Reservation did not extend beyond or to the north of the southeasterly boundary of said Survey 569. That said southeasterly boundary of said Survey 569 has been established, recognized and acquiesced in by the United States as the line beyond which said Mare Island Reservation did not extend, and at no time since 1890 has the United States asserted or attempted to assert or exercise jurisdiction, dominion or sovereignty over any of the lands within said

Survey 569 as a part of said Mare Island Reservation. That on the contrary, ever since 1890 the State of California has, with the knowledge of and without objection by the United States, consistently asserted and exercised its jurisdiction over all of said lands as lands subject to its jurisdiction, dominion and sovereignty and as lands which were not within or a part of said Mare Island Reservation. That said southeasterly boundary line of said Survey 569 became the established, recognized and accepted public boundary line between said [178] Survey 569 and said Mare Island Reservation in the manner next hereinafter set forth;

that part of Paragraph 10 commencing at line 2 on page 13, to-wit:

That on September 28, 1850 the United States by said Swamp Land Act granted to the State of California all unsold swamp and overflowed lands made unfit thereby for cultivation within said State, including, as a part thereof, all of the lands described and referred to in Subdivision II of the Amended Bill of Complaint, being the lands embraced within said Survey 569. That the southeasterly boundary line of the said lands and of the lands owned by defendants as set forth in Exhibit A hereto is the southeasterly boundary of said Survey 569. That on or about the 7th day of April,

1874 the State of California having theretofore and in the year 1869 sold the lands in Survey 569 to one Jacob C. Hinckley, issued its patent for said land to one John W. Pearson, as assignee of said Hinckley, and thereafter the defendants named in paragraph 1 of these Findings of Fact by mesne conveyance acquired from said Pearson those portions of said Survey 569 owned by them as set forth in Exhibit A hereto. That the United States has never at any time occupied any portion of said Survey 569 nor has it at any time used any portion of said lands for any purpose in connection with said Mare Island Reservation nor has any portion of said Reservation been established or located thereon;

that part of Paragraph 10 commencing at line 16 on page 14, to-wit:

That ever since the affirmance of said judgment, until the commencement of this action, said judgment was and has been accepted by the United States and by the State of California and by all persons interested in said lands as conclusively establishing that none of the lands in said Survey 569 was a part of Mare Island or was owned by the United States and until the commencement of this action on the 22nd day of April, 1930 the United States asserted no claim to any right or interest in said lands. That from the affirmance of said judg-

nent to the commencement of this action the southeasterly boundary line of said Survey 569 has consistently been recognized by the United States as the public boundary line between said Mare Island Reservation and the territory subject to the jurisdiction, dominion and sovereignty of the State of California, to wit, the lands described in Subdivision II of the Amended Bill of Complaint, and the State of California has ever since the affirmance of said judgment consistently exercised jurisdiction, dominion and sovereignty over all of the lands embraced in said Survey 569, all as evidenced by the following acts among others: [179]

and asks that the above quoted portions be stricken for the reason that they are not supported by and are contrary to the evidence, and set forth erroneous conclusions of law.

8.

Complainant objects to Paragraph 11, on pages 18 to 20, and asks that it be stricken for the reason that it sets forth erroneous conclusions of law and is irrelevant and immaterial to the issues involved in this case.

9.

Complainant objects to the conclusions of law proposed by defendants, being Paragraphs Nos. 1 and 2 on page 21, and asks that they be stricken for the reason that they are not supported by and are

contrary to the established law. Complainant further objects to the proposed conclusions of law, as follows:

(1) Paragraph 1 of said Conclusions of Law is erroneous in that it asks the Court to rule that the statute of limitations is applicable against the United States to Swamp Land Patents 72 and 152 as described in the answer.

(2) That Paragraph 2 of said Conclusions of Law is based upon Findings of Fact proposed by the Defendants which are not supported by the evidence, namely, the finding that the boundaries and extent of Mare Island, as granted by the State of Mexico to Victor Castro, and as confirmed by the California Land Commission did not include the land in controversy claimed by the defendants.

(3) That Paragraph 2 of said Conclusions of Law is based in part upon the Findings of Fact as proposed by defendants that the defense of equitable estoppel and the defense of established public boundary is available to the defendants against the United States. [180]

In lieu of defendants' proposed findings of fact and conclusions of law, complainant respectfully asks this Court to adopt complainant's proposed findings of fact and conclusions of law, as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled action came on regularly for trial before the above-entitled Court, the Honorable

A. F. St. Sure, United States District Judge, presiding, upon complainant's "Amended Bill of Complaint" and the "Amendments to Amended Bill of Complaint" and upon the "Answer of defendant James Irvine to the Amended Bill of Complaint and to the Amendments thereto" and the first and second amendments to said answer of said defendant and upon the "Answer of Defendants Mary W. Stewart, Sears Point Toll-Road Co., a corporation, American Trust Company, a corporation, Bay Land Company, a corporation, Field and Tule Land Company, a corporation, and West End Land Company, a corporation, to the Amended Bill of Complaint and to the Amendments Thereto" and the first and second amendments to said answer of said defendants, said second amendments to said answers having been filed with leave of court to conform to the proofs. The complainant and said answering defendants appeared by their respective counsel. A stipulation in lieu of answer was filed on behalf of defendant Pacific Gas and Electric Company. The action was, prior to trial and upon stipulation, dismissed with prejudice as to defendants Meta S. Healy (substituted as a defendant in the action in the place of defendant W. H. Healy, deceased) Russ Investment Company, a corporation (sued as Russ Investment Co., a corporation), Henry A. Kendal (sued as Henry A. Kendall), Joseph Dubeault, Wilfrid Debeault (sued as Wilfred Dubeault), and Charles J. Monahan, and as to the lands owned by said defendants described in

the answers filed by said defendants and in the orders of dismissal as to said defendants. Prior to trial defendants Evadne B. Middlemas, Louise DeVoe Brickell, Crocker First Federal Trust Company (substituted as a [181] defendant in the action in place of Howard Brickell, deceased), Ida M. Brickell, Frank E. Knight, California Pacific Realty Company, a corporation, (sued as California Pacific Realty Co., a corporation), California Pacific Title & Trust Company, a corporation, (sued as California Pacific Title and Trust Co., a corporation), American Securities Company, a corporation, (sued as American Securities Co., a corporation, and A. O. Stewart, sued as Fourth Doe, filed disclaimers in the action and as to said defendants the action is dismissed. The following named defendants, to-wit, Henry Claude Kettleman, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe, having failed to appear in the action, decrees pro confesso were ordered against said defendants. Defendant James Clayton, sued as Second Doe, having died more than two years ago, the action as to said defendant is dismissed. Defendant Edmund Burke, sued as to Tenth Doe, having died and Walter E. Burke as administrator of the estate of said Edmund Burke having been substituted as a defendant in his place and stead, and said Walter Burke having died more than two years ago, the action is as to said defendant dismissed.

Defendants Eighth Doe, Ninth Doe and all other defendants not hereinabove specifically mentioned not being found or served, the action is as to them dismissed. The case was tried on June 8th, June 9th, June 11th, and June 15th, 1937, and evidence both oral and documentary having been introduced and received and briefs having been filed and the Court having, upon written stipulation, visited and viewed the lands and premises which are the subject of the action, and the cause having been submitted to the Court for consideration and decision, after due consideration thereof the Court makes its decision and its findings of fact and conclusions of law as follows: [182]

FINDINGS OF FACT.

The Court now finds as follows:

I.

That the defendant Sears Point Toll-Road Co., at all the times mentioned as to it in the complaint on file herein was and now is a corporation organized and established under and by virtue of the laws of the State of California, doing business in and duly organized to transact business in the State of California and having its principal place of business in the City and County of San Francisco;

And that the defendant Bay Land Co., at all the times mentioned as to it in the complaint on file herein, was and now is a corporation organized and established under and by virtue of the laws of the

State of California, doing business in and duly organized to transact business in the State of California, and having its place of business in the City and County of San Francisco;

And that the defendant Field & Tule Land Co., at all the times until the year 1934, mentioned as to it in the complaint on file herein, was a corporation organized and established under and by virtue of the laws of the State of California, doing business in and duly organized to transact business in the State of California and having its principal place of business in the City and County of San Francisco; but that said company since the year 1934, has been and now is disincorporated;

And that the defendant West End Land Co., at all the times mentioned as to it in the complaint on file herein was and now is a corporation organized and established under and by virtue of the laws of the State of California doing business in and duly organized to transact business in the State of California and having its principal place of business in the City and County of San Francisco;

And that the defendant Pacific Gas & Electric Company at all the times mentioned as to it in the complaint on file herein was and now is a corporation organized and established under and by virtue [183] of the laws of the State of California doing business in and duly organized to transact business in the State of California and having its principal place of business in the City and County of San Francisco;

II.

That the place of residence of the other defendants are as alleged in Paragraph I of the Amended Bill of Complaint.

III.

That the complainant, the United States of America, is the owner of, and since the year 1853 has been entitled to the possession of all those certain lands situate, lying and being in the Counties of Napa and Solano in the Northern District of the State of California, and more particularly described and set forth in Exhibit "A" to these Findings which exhibit is incorporated and made a part hereof; and that none of the defendants herein or their predecessors in claim now have or ever have had any estate, right, title or interest in said above described lands or any part thereof. The claim of each defendant is described in said Exhibit "A".

IV.

That by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Republic of Mexico to one Victor Castro of the Isla de la Yegua or Mare Island "in all its extent" which grant included and now embraces said lands referred to in said Paragraph III above, and described in Exhibit "A" hereto. Said instrument was filed for recordation in the office of the County Recorder for Sonoma County, State of

California, on July 28, 1852, said Mare Island, then being within and a part of Sonoma County.

V.

That George W. P. Bissell and William H. Aspinwall did acquire by mesne conveyances all the right, title and interest of said Victor Castro under said grant, and did file their petition in the office of [184] the Board of Land Commissioners asking confirmation to them of their title to the lands included in said grant in accordance with the provisions of the Act of Congress entitled "An act to ascertain and settle the private land claims in the State of California", approved March 3, 1851 (9 Stats. 631); that proceedings were duly and regularly had before said Board of Land Commissioners, which was empowered and authorized to determine the validity of Mexican grants and titles by said Act, and a decree was duly and regularly made and entered by said Board confirming to said petitioners their right and title to the lands in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al., v. United States. In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.

"The place of which confirmation is hereby given is situated in the Bay of San Francisco and is called 'Isla de la Yegua' or 'Mare Is-

land' and being an island is bounded by the water's edge.

"Filed in Office May 8, 1855.
R. AUG THOMPSON
S. B. FARWELL,
Commissioners,
GEORGE FISHER,
Sec'y."

That thereafter said Board duly and regularly did certify its decree with reasons therefor to the United States Attorney for the District of California as provided by Sections 9 and 10 of said Act; that the United States of America by the United States Attorney duly and regularly presented its petition to the United States District Court for the District of California in which said land was situated, and did pray for a review of said decision and decree of said Board; that such proceedings were duly and regularly had in said Court and on March 2, 1857, said Court duly and regularly gave and made its order for judgment in said cause confirming said grant; that thereafter on April 15, 1930, the District Court of the United States for the Northern District of California, the successor to said Court, duly and [185] regularly made and entered its judgment and decree confirming title in the petitioners to the above described lands and directing that said decree be entered nun pro tunc as of the 2nd day of March, 1857.

VI.

That in July, 1877, the Surveyor General of the United States for California in compliance with Section 13 of said Act of March 3, 1851, did cause the boundaries of Mare Island to be surveyed as the boundaries thereof had been finally confirmed, and a plat thereof to be made; that thereafter due notice was given that the same had been done by due publication in the "Alta California", published in the City and County of San Francisco, and the "Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano; and that said survey and plat thereof were retained in the office of the Surveyor General of the United States for California for the period required by said Act; that no objections were made to said survey as provided by said Act and said Surveyor General of the United States for California duly approved said survey and transmitted a copy and a plat thereof to the Commissioner of the General Land Office and Offices, Washington, D. C. for examination and approval.

That thereafter the Commissioner of the General Land Office approved said survey and plat and filed the same in a jacket designated, "Mare Island Jacket" in the file of military reservations in the General Land Office; that on September 22, 1905, the Commissioner of the General Land Office approved, used and acted on said survey and plat and thereafter, on September 22, 1905, the Secretary of the Interior of the United States approved the

action of the Commissioner of the General Land Office and approved, used and acted on said survey and plat.

VII.

That the boundary of Mare Island including the lands described in Exhibit "A" as a part thereof was fixed by the final decrees [186] of confirmation entered by the Board of Land Commissioners and the United States District Court and is the line of mean high tide on the shores of said island as the same was determined by James E. Freeman, Deputy Surveyor of the United States, in his survey of said Island in July, 1877, together with all accretions thereto, as more fully appears from the plat of said survey on file in the office of the United States Surveyor General for California in San Francisco, California; that all of the lands described in Exhibit "A" to these Findings lie within the boundaries of Mare Island as fixed by said Board of Land Commissioners and the United States District Court and as surveyed by said James E. Freeman.

VIII.

That the defendants herein and each and every one of them predicate their claim to, or right, title, interest or estate in said lands hereinbefore described upon the conveyance by the State of California either mediately or immediately of the interest claimed to have been acquired by the provisions of the Act of Congress approved September 28,

1850, (9 Stats. 519) known as the "Swamp Land Act": that none of said defendants claiming any title to or interest in the lands hereinbefore described under conveyances from the State of California are successors in interest of, in privity with, or claim under or in right of the United States in said proceeding for the confirmation of title under the Act of March 3, 1851, (9 Stats. 631); that the decrees entered in said proceedings confirming the title of said lands in George W. P. Bissell and William H. Aspinwall are binding on and conclusive of the rights, title and interest of all defendants herein and their predecessors in claim; that none of said lands was at the time of the passage of the "Swamp Land Act" a part of the public domain of the United States, and no title thereto ever vested in the State of California or its transferees; that said claims of said defendants to the lands hereinbefore described and each and every one of them is without any right whatsoever, and title thereto is and has [187] been in the United States of America since that certain deed of conveyance executed on January 4, 1853, by George W. P. Bissell, W. P. Aspinwall and Mary S. McArthur as grantors to the United States of America as grantee, by which the United States of America acquired all the right, title and interest of the grantors to Mare Island, including all the tule and lowland and marsh belonging to the same or which was ever reputed or claimed to belong to the same; said deed of conveyance being duly recorded

in the County Recorder's Office of Solano County, California, in April 18, 1853.

IX.

That on November 6, 1850, the President of the United States by Executive Order reserved to the United States of America for military and naval purposes and from entry by any individual the following tract of land, among others, on San Francisco Bay, to-wit:

MARE ISLAND.

That on February 9, 1853, the Secretary of the Navy of the United States, acting under and pursuant to the Act of August 31, 1852 (10 Stats. 104), duly selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of tule and marsh land ordinarily reputed to belong to said Island, and the harbors, waters and anchorages connected therewith, and necessary to the use of the same. That thereafter the Secretary of the Navy on February 9, 1853, duly recommended to the President of the United States that said lands and premises be reserved for public use; and on February 11, 1853, President Millard Fillmore did duly approve said recommendation and did make said reservation; that said reservation was communicated to the Secretary of the Interior of the United States and recorded by him pursuant to law.

That the Presidential Reservation of Mare Island included and embraced the above referred to lands described in Exhibit "A" [188] hereto, and by reason of said Presidential Reservations, said lands were withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the Public Land Laws of the United States, and since the dates of reservation herein mentioned, no part of said lands has been subject to appropriation, or the institution of any right under the Public Land Laws of the United States; that the Presidential Reservation aforesaid has never been amended or revoked, and that all the lands described herein in Exhibit "A", ever since the aforesaid dates of reservation, have been and now are a part of the Mare Island Navy Yard Reservation, and held for the exclusive use and benefit of the United States Navy.

X.

That it is not true that the southeasterly boundary line of the Swamp and Overflow Survey No. 569, or any other line, except that line determined by the survey of James E. Freeman, Deputy Surveyor of the United States, was ever established or recognized by the United States or by the State of California as the public boundary line of the Mare Island Navy Yard Reservation; that it is not true that any survey was ever made by any authorized officer or agent of the United States for the purpose of establishing the southeasterly boundary line of S. & O. Survey No. 569 as the public boundary

line of the Mare Island Navy Yard Reservation, nor did the plaintiff, the United States of America, at any time acquiesce in or recognize the establishment of any such line as the boundary of the Mare Island Navy Yard Reservation.

XI.

That the Secretary of the Interior issued three Swamp Land patents to the State of California purporting to issue them pursuant to the provisions of the Swamp Land Act of September 28, 1850 (9 Stats. 519) including among others the above described lands claimed by the defendants herein, namely; [189]

(1) Swamp Land Patent No. 72 issued in June 1896, as to the lands lying within Township 3 N. R. 5 W. (M.D.B. & M.)

(2) Swamp Land Patent No. 152 issued February 7, 1910, as to the lands lying within Township 4 N. R. 5 W. (M.D.B. & M.)

(3) Patent No. 93705 issued April 26, 1924, as to the lands lying within Township 3, N. R. 5 W. and Township 4 N. R. 5 W. (M.D.B. & M.)

That said lands were not at the various times of the issuance of said patents by the Secretary of the Interior, nor at any time, a part of the public domain of the United States open for entry by private persons or subject to the provisions of the

aforesaid Swamp Land Act or to the jurisdiction of the Department of the Interior or the General Land Office of said Department; that said lands at the various times of issuance of said patents, and at all other times since 1853, have been and now are held as a part of the Mare Island Navy Yard Reservation for the exclusive use and benefit of the United States Navy.

XII.

That the defendant Field & Tule Land Co. claims an estate and interest in a tract of land, which was a part of Mare Island, described in Exhibit "A" hereto. At divers times the defendant, Field & Tule Land Co., without the consent of the complainant, or any authorized person acting for or on its behalf, and in violation of the aforesaid Presidential orders of reservation of Mare Island and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said tract of land under said claim and did exclude the complainant herein from possession of said land.

XIII.

That the defendant West End Land Company claims an estate and interest in a tract of land which was a part of Mare Island, as described in Exhibit "A" hereto. At divers times the defendant, West End Land Company, without the consent of the complainant, or any [190] authorized person acting for or on its behalf, and in violation of the

aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land.

XIV.

That the defendant Bay Land Company claims an estate and interest in a tract of land described in Exhibit "A" hereto, which was a part of Mare Island, and at divers times the defendant Bay Land Company, without the consent of the complainant, or any authorized person acting for or on its behalf, and in violation of the aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land.

XV.

That the defendant James Irvine claims an estate and interest in a tract of land described in Exhibit "A" hereto, which is a part of these findings. At divers times the defendant James Irvine, without the consent of the complainant, or any authorized person acting for or on its behalf, and in violation of the aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land.

XVI.

That the defendant Mary W. Stewart claims an estate and interest, in a tract of land described in

Exhibit "A" hereto, which was a part of Mare Island, and at divers times the defendant Mary W. Stewart, without the consent of the complainant, or any authorized person acting for or on behalf of complainant, and in violation of the aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land. [191]

XVII.

That the defendant, the Pacific Gas & Electric Company claims an interest, to-wit, an easement and right of way for transmission line purposes, as described in Exhibit "A" hereto, by virtue of a deed to it, as grantee, dated May 8, 1911 from Lester E. Cross, grantor, and thereafter recorded in the office of the County Recorder of the County of Napa, and of the Office of the County Recorder of the County of Solano, State of California, and at divers times the defendant Pacific Gas & Electric Company, without the consent of the complainant, or any authorized person acting for or on its behalf, and in violation of the aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land.

XVIII.

That the defendant the Sears Point Toll-Road Co. claims an estate and interest in certain tracts of

land described in Exhibit "A" hereto, and at divers times the defendant the Sears Point Toll-Road Co., without the consent of the complainant, or any authorized person acting for or on its behalf, and in violation of the aforesaid Presidential orders of reservation of Mare Island, and of the laws of the United States, did knowingly and wrongfully enter upon, occupy and take possession of said land.

XIX.

The findings of fact of this Court in the case of United States v. O'Donnell, Equity No. 2787-S, that the lands within Survey 34, the neck or isthmus of the land adjoining the high area on the northwest and adjoining the lands involved here on the southeast, were and are a part of Mare Island, and as such were included in the Castro grant, is also determinative in this case that the lands described in Subdivision II of the Amended Bill of Complaint were and are a part of Mare Island, since the findings in United States v. O'Donnell were made [192] upon substantially the same documentary evidence as was introduced in this case, and since there is no water course nor any strip of land lower than the ordinary high water mark or lower than the high high water mark which could constitute a soutern boundary north of said Survey 34 south of the channel described as Dutchman's Slough or Boat Cut-off, but, on the contrary, the lands within said Survey 569 have been at all

times and now are physically a part of the same lands within said Survey 34 and that there is not and never has been any water course nor any strip of land lower than the ordinary high water mark or lower than the high high water mark between said two tracts. Accordingly, this Court's findings in United States v. O'Donnell, relevant to the issue as to what lands constituted Mare Island, to-wit, numbers IV(a); VII, VIII, XVI, XX, XXV, XXVII, XXX, XXXVI, XXXIX, XLI, XLV, XLVI, XLVII, and L, which are attached hereto as Exhibit B, are accepted and incorporated herein as findings in this case.

CONCLUSIONS OF LAW.

The complainant is entitled to a decree as follows:

I.

That the complainant, the United States of America, is and has been since the year 1853 the owner and has been entitled to the immediate possession of all those certain lands situate, lying and being in the Counties of Napa and Solano in the Northern District of California, more particularly described in Exhibit "A" hereto, and that none of the defendants herein or their predecessors in claim now have, or ever have had, any estate, right, title or interest in said above described lands, or any part thereof; and that said lands are adjudged and decreed to be the perfect property of the United States of America, free and clear of all claims of

the defendants, or any of them, and that possession of said lands shall be restored to complainant.

II.

That all leases, agreements, deeds, conveyances, transfers, assignments, patents issued by the Secretary of the Interior or the [193] President of the United States, or other instruments or writing under which defendants, or any of them, claim any estate, right, title or interest in or to said lands or any part thereof, be declared null and void and held for naught in so far as the same may include directly or indirectly the above described lands, or any interest therein.

III.

That the complainant have and recover its costs of suit herein.

.....

United States District Judge.

[194]

EXHIBIT A

(1) Claim of Defendant James Irvine.

Defendant James Irvine claims to be the owner in fee simple absolute (subject to the easement and right of way hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, State of California, more particularly described as follows, to-wit:

Commencing at the point of intersection of the quarter section line running north and south through the middle of Sec. 31, T. 4 N. R. 4 W., with the boundary line between Napa and Solano Counties, and running thence north along said quarter section line to the middle of South Slough; thence in an easterly, southerly and easterly direction following the center line of said South Slough, to the westerly shore of Napa Bay; thence southerly along the shore of said Napa Bay to the northerly line of S. & O. Survey No. 34; thence westerly along the north line of S. & O. Survey No. 34, to the northwest corner thereof; thence south along the west line of said S. & O. Survey #34, to San Pablo Bay; thence northwesterly along the shore of said San Pablo Bay to its point of intersection with the quarter section line running north and south through the middle of Sec. 6, T. 3 N. R. 4 W.; thence north along the middle quarter section line of said Sec. 6 and Sec. 31 to the place of beginning, containing 3524.15 acres, more or less and being 57.15 acres in Napa County and 3467 acres in Solano County. Excepting therefrom that portion conveyed by Mary W. Stewart and A. O. Stewart to Sears Point Toll-Road Company, dated Nov. 3, 1926, recorded Apr. 1, 1927, in Book 288 of Deeds, at page 434.

Defendant Pacific Gas and Electric Company claims to be the owner of the right of way and ease-

ment for transmission line purposes granted to it by that certain right of way deed, dated May 8, 1911, from Lester E. Cross, as grantor, over the above described land, and recorded in the office of the County Recorder of the County of Napa, California, May 15, 1911, and in the office of the County Recorder of the County of Solano, California, on May 26, 1911.

The Court finds the fact to be that neither the defendant James Irvine nor the defendant Pacific Gas and Electric Company has any right, title, or interest in the above described land, and the plaintiff, the United States of America, is the owner thereof in fee simple absolute. [195]

(2) Claim of Mary W. Stewart.

Defendant Mary W. Stewart claims to be the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain property situate, lying and being in the County of Solano, State of California, more particularly described as follows, to-wit:

> All that portion of the West half of Section 31, T. 4 N. R. 4 W., lying South of South Slough and within Solano County.
>
> Also the fractional West half of Section 6, T. 3 N. R. 4 W., lying within the boundary of Swamp & Overflowed Land No. 569; said parcels being a portion of Swamp and Overflowed Lands, Survey No. 569 and situate on Cross Island.

Excepting therefrom the following described premises known as Sears Point Toll Road, described as follows: Beginning at the point of intersection of the easterly boundary line of the West ½ of fractional Section 6, with the surveyed line of said Toll Road, said point being Engineer's Station 220 + 91.13 of said surveyed line and running thence N. 65° 50′ 30″ W. 311.56 feet to Engineer's Station 224 + 02.69; thence along a curve to the left of radius of 20,000 feet 523.60 feet to Engineer's Station 229 + 26.29; thence N. 67° 20′ 30″ W. 939.15 feet to Engineer's Station 238 + 65.44; thence along a curve to the right of radius of 2000 feet; 379.12 feet to Engineer's Station 242 + 44.56; thence N. 56° 29′ 10″ W. 815.87 feet to Engineer's Station 250 + 60.43, being a point on the westerly boundary line of fractional Section 6, from which the meander corner of Lot 1, Section 6, T. 3 N. R. 4 W., M.D.B. & M., bears S. 0° 01′ E. 352.63 feet along said Section line, said strip of land containing 6.82 acres, more or less. Excepting also that portion lying within the County Road.

Defendant Pacific Gas and Electric Company claims to be the owner of the right of way and easement for transmission line purposes, over the above-described land, granted by that certain right of way deed, given by Lester E. Cross, dated May 8, 1911, referred to above in the description of the claim of James Irvine.

The Court finds the fact to be that neither the defendant Mary W. Stewart nor the defendant Pacific Gas and Electric Company has any right, title, or interest in the above-described land, and the plaintiff, the United States of America, is the owner thereof in fee [196] simple absolute.

(3) Claim of Defendant Sears Point Toll-Road Co.

The defendant, Sears Point Toll-Road Co., claims to be the owner in fee simple absolute (subject to the Trust Indenture and Supplemental Trust Indenture to defendant American Trust Company hereinafter mentioned) of all that certain real property situate, lying and being in the County of Solano, State of California, more particularly described as follows:

Parcel "D":

Tract (1) Beginning at the Meander corner of the United States Public Land Surveys, common to Tract No. 38 (Mare Island Navy Yard) and fractional Section 10 T. 3 N. R. 4 W. Mount Diablo Base and Meridian, on the westerly bank of Napa River; and running thence S. 64° 45′ W. 1090.32 feet along the Northern boundary line of said Tract No. 38 to an angle point in said boundary line; thence continuing along said boundary line N. 89° 56′ 30″ W. 1980 feet to the most northwesterly corner of said Tract No. 38; thence, leaving said boundary line, N. 0° — 03′ 30″ E. 170.42

feet to a point 95 feet northerly at right angles from the surveyed line for the Toll Road of Sears Point Toll Road Co. at Engineers Station 58 + 72.79 thereof; thence S. 89° — 56′ — 30″ E. 1416.69 feet; thence along a curve to the left of radius 870 feet, 384.13 feet; thence North 64° — 45′ E. to the line of mean lower low water along the westerly bank of Napa River; thence southerly along said line of mean lower low water to the point of intersection thereof with a line extending N. 64° 45′ E. through said meander Corners and thence S. 64° — 45′ W. along the last described line extending through said Meander Corner to the point of beginning; containing 15.09 acres (more or less); and being a portion of said fractional section 10 and the accretion on the Napa River frontage, and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California.

Tract (2) A strip of land of the uniform width of 160 feet, described as follows, to-wit:

Beginning at a point 65′ distant, measured southerly at right angles to the surveyed line hereinafter described, from Engineers Station 58 + 72.79 of the surveyed line for the Toll Road of Sears Point Toll Road Co., said point being N 0° — 03′ — 30″ E. 10.42 feet distant from the most northwesterly corner of Tract 38, U. S. Public Land Surveys (Mare Island Navy Yard) and being on the westerly bound-

ary of Tract No. 1, hereinabove described; and running thence parallel to said surveyed line, N. 89° — 56′ 30″ W. 1431.84 feet to a point from which the corner common to fractional sections 9, 10, 15 and 16, T. 3 N. R. 4 W. M.D.B. & M., bears S. 0° — 03 — ½′ W. 1281.05 feet distant; thence [197] continuing on the same course, N. 89° — 56′ 30″ W. 1175.70 feet; thence westerly along a curve to the right having a radius of 1030 feet, for a distance of 577.05 feet; thence N. 32° — 09′ 30″ E. 160 feet; thence easterly along a curve to the left for a distance of 487.42 feet, said curve having a radius of 870 feet, and being parallel to the southerly boundary above described; thence S. 89° 56′ 30″ E. 2607.54 feet, to a point 95′ distant, measured at right angles to said surveyed line, northerly from said Engineers Station 58 + 72.79 of said surveyed line; thence southerly 160 feet at right angles to said surveyed line to the point of beginning; situate in and being a part of fractional section 9 and 10, T. 3 N., R. 4 W. M.D.B. & M., and being a part of Swamp and Overflow Land Survey No. 569, Solano County, California, and containing 11.64 acres (more or less).

Tract (3) Beginning at the most southwesterly corner of Tract 2 of Parcel D described above; and running thence N 32° 09′ 30″ E. along the westerly boundary of said Tract No. 2, for a distance of 130 feet to a point on said

boundary; thence N 57° 50′ 30″ W. 2455.46 feet; thence along a curve to the left having a radius of 10,100 feet for a distance of 540.59 feet; thence N 60° 54′ 30″ W. 2149.57 feet; thence along a curve to the left having a radius of 20,100 feet for a distance of 321.58 feet; thence N. 61° 49′ 30″ W. 1622.51 feet; thence along a curve to the left having a radius of 20,100 feet for a distance of 923.84 feet; thence N. 64° 27′ 30″ W. 986.52 feet; thence along a curve to the right having a radius of 9,900 feet for a distance of 492.45 feet; thence N. 61° 36′ 30″ W. 1332.62 feet to a point which bears N. 28° 23′ 30″ E. 100 feet distant from Engineers Station 198 + 67.0 of the survey for Toll Road as surveyed for Sears Point Toll Road Co., thence S. 28° 23′ 30″ W. 130 feet; thence S. 61° 36′ 30″ E. 1332.62 feet; thence along a curve to the left having a radius of 10,030 feet for a distance of 498.91 feet; thence S. 64° 27′ 30″ E. 986.52 feet; thence along a curve to the right having a radius of 19,970 feet for a distance of 917.86 feet; thence S. 61° 49′ 30″ E. 1622.51 feet; thence along a curve to the right having a radius of 19,970 feet for a distance of 318.49 feet; thence S 60° 54′ 30″ E. 2149.57 feet; thence along a curve to the right having a radius of 9,970 feet for a distance of 533.63 feet; thence S. 57° 50′ 30″ E. 2455.46 feet to the point of beginning; said parcel being a strip of land of a uniform width of 130 feet extend-

ing from the westerly boundary of Tract No. 2, hereinbefore described, to a line at right angles to the surveyed line of Toll Road for Sears Point Toll-Road at Engineers Station 198 + 67 thereof, and said Tract No. 3, containing 32.29 acres more or less.

Tract (4) A strip of land of the uniform width of 160 feet, extending from the westerly boundary line of Tract No. 3, hereinbefore described, which is a line at right angles to the surveyed line for the Toll Road of Sears Point Toll Road Co. at Engineers Station [198] 198 + 67 thereof, to the westerly boundary line of the lands now or formerly belonging to Eva L. Ricks, said boundary line of the lands of Eva L. Ricks being the easterly boundary line of the West one-half of fractional section 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian, and is the division line between said lands of Eva L. Ricks and lands now or formerly belonging to Henry Claude Kettleman, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from said surveyed line for Toll Road between said line at right angles to said surveyed line of Engineers Station 198 + 67 and said easterly boundary line of the West one-half of fractional section 6, the point of intersection of said one-half section line and said surveyed line for Toll Road being Engineers Station 220 + 91.13 thereof, the northerly boundary line of said

strip being parallel to and 130 feet distant at right angles northerly from said surveyed line for Toll Road between said line at right angles to said surveyed line at Engineers Station 198 + 67 and said easterly boundary line of the West one-half of fractional section 6; said strip of land containing 8.17 acres (more or less) situate in and being a part of the East one-half of said fractional section 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian and of Swamp Overflow Land Survey No. 569, Solano County, California; the portion of said surveyed line hereinabove mentioned being described as follows, to-wit: Beginning at Engineers Station 198 + 67 and running thence N. 61° 30″ W. 433.40 feet to Engineers Station 202 + 90.40; thence northwesterly along a curve to the left, of radius 2000 feet, 244.93 feet to Engineers Station, 205 + 35.33; thence N. 68° 37′ 30″ W. 718.34 feet to Engineers Station 212 + 53.67; thence northwesterly along a curve to the right, of radius 10,000 feet, 485.75 feet to Engineers Station 217 + 39.42; thence N. 65° 30′ 30″ W. 351.71 feet to Engineers Station 220 + 91.13 a point on the easterly line of the West one-half of fractional section 6 T. 3 N. R 4 W. Mount Diablo Base and Meridian; the beginning point of the above described portion of said survey line for Toll Road being located and defined as follows, to-wit: Commencing at the meander corner com-

mon to fractional sections 5 and 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian; and running thence N. 0° 06′ W. 403.5 feet to Engineers Station 191 + 68.70 of said surveyed line for Toll Road, thence along said surveyed line N. 61° 36′ 30″ W. 698.30 feet, to said Engineers Station 198 + 67, to the point of beginning.

Parcel "E": A strip of land of the uniform width of 100 feet extending from the easterly boundary line of the West ½ of fractional Section 6, T. 3 N. R. 4 W. M. D. M., to the westerly boundary line thereof, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Co. and the northerly boundary line of said strip being parallel to and 70 feet distant at right angles northerly from said surveyed line of Toll Road, said [199] surveyed line for Toll Road of Sears Point Roll Road Co. being as described in the survey and description of the route and of the land necessary for the said Toll Road, recorded by the Commissioners in the Matter of the said Toll Road in the Office of the County Clerk of Solano County, California, April 15th, 1926, and reported to and approved by the Board of Supervisors of said Solano County on the said 15th day of April, 1926, and entered of record in the journal of the said Board of Supervisors, the portion of

said surveyed line hereinabove referred to being described as follows, to-wit:

"Beginning at a point of intersection of said easterly boundary line of the West ½ of fractional section 6, with said surveyed line, said point being Engineers' Station 220 + 91.13 of said surveyed line, and running thence N. 65° 50′ 30″ W. 311.56 feet to Engineers' Station 224 + 02.69, thence along a curve to the left of radius 20,000 feet, 523.60 feet to Engineers' Station 229 + 26.29, thence N. 67° 20′ 30″ W. 939.15 feet to Engineers' Station 238 + 65.44, thence along a curve to the right of radius of 2000 feet, 379.12 feet to Engineers' Station 242 + 44.56, thence N. 56° 29′ 10″ W. 815.87 feet to Engineers' Station 250 + 60.43 being a point on said westerly boundary line of fractional section 6, from which the meander corner of Lot 1, Sec. 6, T. 3 N. R. 4 W. M. D. B. & M., bears S. 0° 01′ E. 352.63 feet along said Section line, said strip of land containing 6.82 acres, more or less.

Parcel "F": A strip of land of the uniform width of 100 feet extending from the westerly boundary line of Fractional Section 6, T. 3 N. R. 4 W., M. D. B. & M., to the easterly boundary line of lands now or formerly belonging to Bay Land Company, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Co.

and the northerly boundary line of said strip being parallel to and 70 feet distant at right angles northerly from said surveyed line for Toll Road, said surveyed line for Toll Road of Sears Point Toll Road Company being as described in the survey and description of the route and of the land necessary for the said Toll Road, recorded by the Commissioners in the matter of the said Toll Road, in the Office of the County Clerk of Solano County, California, April 15, 1926, and reported to and approved by the Board of Supervisors of said Solano County of the said 15th day of April 1926, and entered of record on the journal of the said Board of Supervisors, the portion of said surveyed line hereinabove referred to being described as follows, to-wit: [200]

Beginning at the point of intersection of said westerly boundary line of fractional section 6 which line bears S 0° 01′ E. with said surveyed line for Toll Road at Engineers' Station 250 + 60.43 thereof from which Station the meander corner of Lot 1, Sec. 6, T. 3 N. R. 4 W., M.D.B. & M., bears S 0° 01′ E. 352.63 feet distant, and running thence along said surveyed line N 56° 29′ 10″ W. 127.57 feet to Engineers' Station 251 + 88, thence along a curve to the left of radius 2000 feet, 68.55 feet to Engineers' Station 252 + 56.55 being a point on the said easterly boundary line of lands now or formerly belonging to Bay Land Company, which

line bears N 0° 07½′ W. said strip of land containing 0.45 acres, more or less.

Parcel "G": A strip of land of the uniform width of 100 feet extending from the westerly boundary line of lands now or formerly belonging to John C. Brickell which line bears N 0° 07½′ W. to the easterly boundary line of lands now or formerly belonging to Field and Tule Land Company which line bears N 0° 32½′ W. the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Company, and the northerly boundary line of said strip of land being parallel to and 70 feet northerly at right angles from said surveyed line for Toll Road; said surveyed line for Toll Road of Sears Point Toll Road Co. being as filed in the office of the County Clerk of Solano County, California, on the 15th day of April, 1926, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at Engineers Station 252 + 56.35 being a point on said westerly boundary line of lands of John C. Brickell and running thence along a curve to the left of radius 2000 feet, 293.71 feet to Engineers Station 255 + 50.06; thence N 66° 51′ 30″ W., 2929.94 feet to Engineers Station 284 + 80, being a point on said easterly boundary line of lands of Field and Tule Land Company; said strip of land con-

taining 7.40 acres (more or less) situated in and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California, said point of beginning, station 252 + 56.35 being located and defined as follows, to-wit: Commencing at the Meander Corner common to fractional section 6, T. 3 N. R. 4 W., and fractional section 1, T. 3 N. R. 5 W., Mount Diablo Base and Meridian and running thence N 0° 01′ W., 352.63 feet to Engineers Station 250 + 60.43 of said surveyed line of Toll Road, thence along said line N 56° 29′ 10″ W. 127.57 feet to Engineers Station 251 + 88; thence along a curve to the left of radius 2000 feet, 68.55 feet to said point of beginning, also the right to take from the 60 feet next adjoining the North boundary of said right of way, the material necessary for road construction and maintenance. [201]

Parcel "H": Tract (1) A strip of land of the uniform width of 100 feet extending from the westerly line of lands now or formerly belonging to Bay Land Company, which line bears North 0° 32½′ West, to the easterly line of lands now or formerly belonging to West End Land Company, which line bears North 0° 7½′ West, the southerly boundary line of said strip being parallel to and thirty feet distant at right angles southerly from the surveyed line for the Toll-Road of Sears Point Toll-Road Co., and the northerly boundary line of said

strip being parallel to and 70 feet distant at right angles northerly from said surveyed line for Toll Road, the portion of said surveyed line hereinabove referred to being described as follows, to-wit: Beginning at the point of intersection of said westerly line of land of Bay Land Company with said surveyed line at Engineers Station 284. + 80 thereof, and running thence North 66° 51′ 30″ West 167.89 feet to Engineers Station 286 + 47.89, thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32, thence North 59° 06′ 40″ West, 817.35 feet to Engineers Station 297 + 35.67, thence along a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station 301 + 65.82; thence North 71° 26′ West 1527.36 feet to Engineers Station 316 + 93.18, thence along a curve to the right having a radius of 1000 feet for a distance of 365.96 feet to Engineers Station 320 + 59.14, thence North 50° 28′ West 336.31 feet to Engineers Station 323 + 95.45, thence along a curve to the left having a radius of 3000 feet for a distance of 352.99 feet to Engineers Station 327 + 48.44, thence North 57° 12′ 30″ West 1014.2 feet to Engineers Station 337 + 62.64, being a point on said easterly line of lands of West End Land Company, said point of beginning being located and defined as follows, to-wit: Commencing at the meander corner

common to fractional Section 6, Township 3 North, Range 4 West and fractional Section 1, Township 3 North, Range 5 West, Mount Diablo Base and Meridian, and running thence North 0° 01′ West 352.63 feet to Engineers Station 250 + 60.43 on said surveyed line of Toll-Road, thence along said surveyed line North 56° 29′ 10″ West 127.57 feet to Engineers Station 251 + 88, thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 50.06, thence North 66° 51′ 30″ West, 2929.94 feet to Engineers Station 284 + 80, being said point of beginning, said strip of land containing 12.12 acres (more or less) situate in and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California.

Tract (2) The right or easement to take earth and soil for the construction, maintenance and repair of the Toll Road to be constructed by Sears Point Toll-Road Co.,—extending along the property described as [202] "Tract (1) of Parcel "H" above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet, extending the entire length of the property above described, the southerly boundary of said strip of land being the northerly boundary of "Tract (1) of Parcel "H" above described, and the northerly boundary of said strip of

land hereby described being parallel to and 60 feet distant at right angles northerly at all points from said northerly boundary of (Tract (1) of Parcel "H" above described); containing 7.28 acres, more or less.

Parcel "I": All that portion of that certain real property situated in the County of Solano, State of California, described as follows, to-wit:

Tract (1) A strip of land of the uniform width of 100 feet extending from the westerly boundary line of the lands now or formerly belonging to the Field and Tule Land Company, which line bears N 0° 07½′ West to the line of mean lower low water in Sonoma Creek, the southerly boundary of said strip of land being parallel to and thirty feet distant at right angles southerly from the surveyed line for the Toll-Road of Sears Point Toll Road Co., and the northerly boundary of said strip of land being parallel to and distant one hundred feet at right angles northerly from said southerly boundary of the herein described strip of land, the portion of said surveyed line hereinabove referred to being described as follows, to-wit: Beginning at the point of intersection of the westerly line of said lands now or formerly belonging to Field and Tule Land Company with the said surveyed line of Toll-Road at Engineers Station "C" 337 + 62.64, and running thence North 57° 12′ 30″ W. 1205.92 feet to Engineers Station "C" 349 + 68.56, thence

along a curve to the left having a radius of 3000 feet for a distance of 635.23 feet to Engineers Station "C" 356 + 03.79 which equals Station 356 + 18.87, thence North 69° 20′ 30″ West, 194.25 feet to Engineers Station 358 + 13.12, thence along a curve to the left, having a radius of 2000 feet, for a distance of 92.02 feet to Engineers Station 359 + 05.14, thence North 71° 58′ 40″ West 1326.40 feet to Engineers Station 372 + 31.54, thence along a curve to the left having a radius of 2000 feet for a distance of 157.46 feet to Engineers Station 373 + 89, thence North 76° 29′ 20″ West, 1981.20 feet to Engineers Station 393 + 70.20, thence along a curve to the right having a radius of 2000 feet for a distance of 457.67 feet to Engineers Station 398 + 27.87, thence North 63° 22′ 40″ West, 1034.44 feet to Engineers Station 408 + 62.31, thence along a curve to the left having a radius of 1000 feet for a distance of 471.33 feet to Engineers Station 413 + 33.64, thence South 89° 37′ West parallel to the northerly boundary of Solano County, 48.42 feet to Engineers Station 413 + 82.06, which equals Station 413 + 91.11, from which Station a 6″ x 6″ post on said County boundary bears North 43° 34′ West, 86.2 feet; [203] thence continuing on said course South 89° 37′ West parallel to and distant 62 feet at right angles southerly from said northerly boundary line of Solano County to the line of mean lower low water on the easterly

side of Sonoma Creek, the beginning point of said portion of surveyed line, Station 337 + 62.64, being located and defined as follows, to-wit: Commencing at the meander corner on the westerly boundary line of fractional section 6, T 3 N, R 4 W, Mount Diablo Base and Meridian, and running thence North 0° 01′ West, 352.63 feet to Engineers Station 250 + 60.43, on said surveyed line of Toll-Road, thence along said surveyed line North 56° 29′ 10″ West, 127.57 feet to Engineers Station 251 + 88, thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 50.06, thence North 66° 51′ 30″ West, 3097.83 feet to Engineers Station 286 + 47.89, thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32; thence North 59° 06′ 40″ West, 817.35 feet to Engineers Station "C" 297 + 35.67, thence along a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station "C" 301 + 65.82, thence North 71° 26′ West 1527.36 feet to Engineers Station "C" 316 + 93.18, thence along a curve to the right having a radius of 1000 feet for a distance of 365.96 feet, to Engineers Station "C" 320 + 59.14, thence North 50° 28′ West 336.31 feet to Engineers Station "C" 323 + 95.45, thence along a curve to the left having a radius of 3000 feet for a distance of 352.99 feet

to Engineers Station "C" 327 + 48.44, thence North 57° 12′ 30″ West, 1014.20 feet to Engineers Station "C" 337 + 62.64, being a point on the easterly line of lands of West End Land Company, and being said point of beginning; said above described strip of land containing 18.20 acres (more or less) situate in and being a part of Swamp and Overflow Survey No. 569, Solano County, California.

Tract (2) The right or easement to take earth and soil for the construction, maintenance and repair of the Toll-Road to be constructed by Sears Point Toll-Road Co., extending along the property described in Tract (1) of Parcel "I" above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet extending from the westerly boundary line of lands now or formerly belonging to the Field and Tule Land Company, which line bears North 0° 7½′ West, to the line of mean lower low water in Sonoma Creek, the southerly boundary line of said strip of land being the northerly boundary of Tract (1) in Parcel "I" above described, and the northerly boundary of said strip of land hereby described being parallel to and 60 feet distant at right angles northerly at all [204] points from the above described southerly boundary of said strip of land hereby described, containing 10.92 acres, more or less.

The defendant American Trust Company, claims to be the owner and holder of the interest in the above-described real property conveyed to it under that certain Trust Indenture, from Sears Point Toll-Road Co., to American Trust Company, dated June 1, 1926, and recorded March 1, 1927, in the Office of the County Recorder of the County of Solano, California, and by virtue of that certain Supplemental Trust Indenture, dated June 1, 1927, and recorded June 29, 1927, in the Office of said County Recorder of Solano County, California.

The Court finds the fact to be that neither the defendant Sears Point Toll-Road Co., nor the defendant American Trust Company have any right, title, or interest in the above-described real property, and that the plaintiff, The United States of America, is the owner of the whole thereof in fee simple absolute.

(4) Claim of Defendant Bay Land Company.

Defendant Bay Land Company claims to be the owner in fee simple absolute (subject to the easement and right of way hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, California (excepting from the land described those portions thereof lying in Section 25, Township 4 North, Range 5 West, and Section 30, Township 4 North, Range 4 West, M.D.B. & M.), to-wit:

> Beginning at a point on the boundary line between Solano and Napa Counties, which point is on the West line of Section 31, Township 4

North, Range 4 West, Mount Diablo Base and Meridian, as said section line was re-established by E. N. Eager, County Surveyor, in February 1915, and is 397.25 chains West of the West of the West line of Section 36, in Township 4 North, Range 4 West, Mount Diablo Base and Meridian; thence from said point of beginning South 102.90 chains to the shore of San Pablo Bay; thence along said shore line in a westerly direction about 48 chains to a point which is 44.00 chains West of the West line of said Section 31; thence North 0° 25′ West 66.40 chains to the middle of South Slough, at a point which is 44.50 chains west [205] of the West line of said Section 31; thence along the middle of said South Slough in a northerly direction about 18 chains to the County boundary line; thence follow the middle of said South Slough, northerly, easterly and southerly about 150 chains to said County boundary line again; thence along same North 89° 25′ West 14.50 chains to the place of beginning. Containing 630.50 acres, more or less.

Excepting therefrom that portion of the above described tract heretofore conveyed to Sears Point Toll-Road Co.

Defendant Pacific Gas and Electric Company claims to be the owner of the right of way and easement for transmission lines purposes over the above-described lands granted to it by that certain deed

from Lester E. Cross, dated May 8, 1911, referred to above in the description of the claim of James Irvine.

The Court finds the fact to be that neither the defendant Bay Land Company, nor the defendant Pacific Gas and Electric Company, has any right, title, or interest in the above described land, and that the plaintiff, the United States of America, is the owner thereof in fee simple absolute.

(5) Claim of Defendant Field and Tule Land Company.

Defendant Field and Tule Land Company claims to be the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain property situate, lying and being in the Counties of Napa and Solano, California, more particularly described as follows (excepting from the land described that portion thereof lying in Section 25, Township 4 North, Range 5 West, M.D.B. & M.), to-wit:

> Commencing at a point on the boundary line between said Solano and Napa Counties, which point is 154.25 chains West of the quarter-section line running North and South through the middle of Section 31, Township 4 North, Range 4 West, Mount Diablo Base and Meridian, which said quarter-section line was re-established by E. N. Eager, County Surveyor, in February, 1915, and is 357.25 chains West of the West line of Section 36, Township 4 North, [206] Range 4 West, Mount Diablo Base and

Meridian; thence from said point of commencement North 14.40 chains to the South bank of Huichica Creek; thence along the same in an easterly direction about 63 chains to the middle of South Slough; thence along said South Slough, southerly and easterly about 42 chains to a point which is 84.50 chains West of said quarter-section line running North and South through the middle of said Section 31; thence South 0 degrees 25 minutes E. 66.40 chains to the shore of San Pablo Bay; thence along said shore line northwesterly about 81 chains to the southeasterly corner of that certain 472.46 acre tract of land conveyed by John C. Brickell (an unmarried man) to Bay Land Company, a corporation, by deed dated May 20, 1921, and recorded in the office of the County Recorder of the County of Solano on June 17, 1921, in Liber 254 of Deeds at page 453 and also recorded in the office of the County Recorder of the County of Napa on June 21, 1921, in Liber 132 of Deeds at page 260, and thence North and along the East boundary of land so conveyed to Bay Land Company 45 chains to the point of commencement, containing 500 acres.

Excepting therefrom that portion of the above described tract heretofore conveyed to Sears Point Toll-Road Co.

Defendant Pacific Gas and Electric Company claims to be the owner of the right of way and ease-

ment for transmission lines purposes over the above-described lands granted to it by the right of way deed given by Lester E. Cross, May 8, 1911, referred to above in the description of the claim of James Irvine.

The Court finds the fact to be that neither the defendant Field and Tule Land Company, nor the defendant Pacific Gas and Electric Company, has any right, title, or interest in the above-described land, and that the plaintiff, the United States of America, is the owner thereof in fee simple absolute.

(6) Claim of Defendant West End Land Company.

The defendant West End Land Company, claims to be the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, California, more particularly described as follows, to-wit: [207]

Beginning at a point on the boundary line between Solano and Napa Counties, which point is 154.25 chains West of the quarter Section line running North and South through the middle of Section 31, Township 4 North, R. 4 West, M.D.B. & M., and which quarter section line was re-established by E. N. Eager, County Surveyor in February, 1915, and is 357.25 chains West of the West line of Section 36, in Township 4 North, Range 4 West, M.D.B. & M.,

thence from said point of beginning, North 14.40 chains to the South bank of the Huichica Creek; thence along same westerly about 125 chains to the County boundary line, at a point about 1.75 chains West of a County boundary post and about 109.17 chains westerly from the point of beginning; thence along the shore line of San Pablo Bay, southeasterly about 120 chains and thence North about 45 chains to the place of beginning, containing 472.46 acres, more or less.

Excepting therefrom property sold to Sears Point Toll Road Co., by deed dated November 19, 1926, and recorded April 1, 1927, in Book 288 of Deeds, page 446, described as follows:

Parcel No. 1: A strip of land of the uniform width of 100 feet extending from the westerly boundary line of the lands now or formerly belonging to the Field and Tule Land Company, which line bears N. 0° 07½′ W. to the line of a mean low water in Sonoma Creek, the southerly boundary of said strip of land being parallel to and 30 feet distant at right angles southerly from the surveyed line for the toll road of Sears Point Toll Road Co., and the northerly boundary of said strip of land being parallel to and distant 100 feet at right angles northerly from said southerly boundary of the herein described strip of land, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at the point of intersection of the westerly line of said lands now or formerly belonging to Field and Tule Land Company with the said surveyed line of Toll-Road at Engineers Station "C" 337 + 62.64 and running thence N. 57° 12' 30" W. 1205.92 feet to Engineer's Station "C" 349 + 68.56; thence along a curve to the left, having a radius of 3000 feet for a distance of 635.23 feet to Engineer's Station "C" 356 + 03.79 which equals Station 356 + 18.87; thence N. 69° 20' 30" W. 194.25 feet to Engineers Station 358 + 13.12; thence along a curve to the left having a radius of 2000 feet, for a distance of 92.02 feet to Engineers Station 359 + 05.14; thence N. 71° 58' 40" W. 1326.40 feet to Engineers Station 372 + 31.54; thence along a curve to the left having a radius of 2000 feet for a distance of 157.46 feet to Engineers Station 373 + 89; thence N. 76° 29' 20" W. 1981.20 feet to Engineers Station 393 + 70.20; thence along a curve to the right having a radius of 2000 feet for a distance of 457.67 feet to Engineers Station 398 [208] + 27.87; thence N. 63° 22' 40" W. 1034.44 to Engineers Station 408 + 62.31; thence along a curve to the left having a radius of 1000 feet for a distance of 471.33 feet to Engineers Station 413 + 33.64; thence S. 89° 37' W. parallel to the northerly boundary of Solano Co., 8.42 feet to Engineers Station 413 + 82.06, which equals Station 413 + 91.14 from which Station a 6"

x 6" post on said County boundary bears N. 43° 34' W. 86.2 feet; thence continuing on said course S. 89° 37' West parallel to and distant 62 feet at right angles southerly from said northerly boundary line of Solano County to the line of mean low water on the easterly side of Sonoma Creek, the beginning point of said portion of Surveyed line, Station 337 + 62.64 being located and defined as follows, to-wit:

Commencing at the meander corner on the westerly boundary line of fraction Section 6, T. 2 N. R. 4 W. M.D.B. & M., and running thence N. 0° 01' W. 352.63 feet to Engineers Station 250 + 60.43 on said surveyed line of Toll Road; thence along said surveyed line N. 56° 29' 10" W. 127.57 feet to Engineers Station 251 + 88; thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 60.06; thence N. 66° 51' 30" W. 3097.83 feet to Engineers Station 286 + 47.89; thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32; thence N. 59° 06' 40" W. 817.35 feet to Engineers Station "C" 297 + 35.67; thence along a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station "C" 301 + 65.82; thence N. 71° 26' W. 1527.36 feet to Engineers Station "C" 316 + 93.18; thence along a curve to the right having a radius of 1000 feet for a distance of 365.96

feet to Engineers Station "C" 320 + 59.14; thence N. 50° 28′ W. 336.31 feet to Engineers Station "C" 323 + 95.45; thence along a curve to the left having a radius of 3000 feet, for a distance of 352.99 feet to Engineers Station "C" 327 + 48.44; thence N. 57° 12′ 30″ W. 1014.20 feet to Engineers Station "C" 337 + 62.64 being a point on the easterly line of lands of West End Land Company, and being said point of beginning, said above described strip of land containing 18.20 acres, more or less, situate in and being a part of Swamp and Overflowed Survey No. 569, Solano County, Cal.

Also Excepting Parcel #2. The right or easement to take earth and soil for the construction, maintenance and repair of the Toll-Road to be constructed by the party of the first part, extending along the property described in Parcel 1 above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet extending from the westerly boundary line of land now or formerly belonging to the Field and Tule Land Company, which line bears N. 0° 7½′ W. to the line of [209] mean low water in Sonoma Creek, the southerly boundary line of said strip of land being the northerly boundary of Parcel 1 above described, and the northerly boundary of said strip of land hereby described being parallel to and 60 feet distant at

right angles northerly at all points from the above described southerly boundary of said strip of land hereby described, containing 10.92 acres, more or less.

Defendant Pacific Gas and Electric Company, claims to be the owner of the right of way and easement for transmission lines purposes over the above described lands granted to it by that certain right of way deed given by Lester E. Cross, referred to in the description of the claim of James Irvine.

The Court finds the fact to be that neither the defendant West End Land Company, nor the defendant Pacific Gas and Electric Company, has any right, title, or interest in the land described above, and that the plaintiff, the United States of America, is the owner thereof in fee simple absolute. [210]

EXHIBIT B

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN UNITED STATES v. O'DONNELL, NO. 2787-S RELEVANT TO THE ISSUE IN UNITED STATES v. MARY W. STEWART AS TO WHAT LANDS CONSTITUTED MARE ISLAND.

IV(a)

In July, 1877, the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California", approved

March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to-wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on said survey and plat. [21]

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of section 3 of the Act of August 31, 1852, (10 Stats. 104), duly selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island, and the harbors, waters and anchorages connected therewith, and necessary to the use of the same and within which is included the lands and premises described in paragraph II of the Bill of Complaint herein, as a site for a Navy Yard and Naval Depot provided for by said Act of Congress.

Following said selection the Secretary of the Navy on February 9, 1853, recommended to the President of the United States that said lands and premises be reserved for public use, and on February 11, 1853, President Millard Fillmore duly approved said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his order making such reservation is attached to the Bill of Complaint marked Exhibit "D" and referred to and incorporated therein.

From time to time Congress of the United States of America duly approved, ratified and confirmed said reservation and by various statutes appropriated large sums to improve the lands comprised therein and authorized their improvement. [212]

VIII.

The lands and premises described in paragraph II of Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California, under the rule and occupancy of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court as aforesaid, to George W. P. Bissell and William H. Aspinwall, and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

XVI.

It is not true that the proceeding to confirm the said grant of Mare Island to said Castro and his mesne successors had terminated on June 4, 1853, by their conveyance of said premises to plaintiff or plaintiff's acceptance of the same, and it is true that the said granted premises included Mare Island to the water's edge, but it is not true that it did not include any portion of the premises sought to

be described, delineated and depicted in State Segregation Surveys Nos. 34 or 569, or either of them, or any land north of a line drawn from Station 54 to Station 138 as depicted in Freeman's survey of 1877.

XX.

It is not true that the premises described in paragraph II of plaintiff's Complaint are a part of any Island No. 1 embraced in said Surveys Nos. 34 or 569 as [213] depicted on the official maps of plaintiff, copies of which, marked respectively "A" and "B" are attached to the joint answer of defendants filed March 31, 1931, and therein referred to and incorporated, or as reported or depicted in any approved survey and plat of Township 4 North, Range 4 West, M. D. B. & M., accepted November 8, 1923, were on September 28, 1850, or at any time or at all, or ever, a part of the public domain of the United States, or swamp and overflowed lands embraced in Swamp and Overflowed Land Grant to California at that date.

It is not true that said premises or any part thereof were not within the exterior boundaries of Mare Island or were north of the northern boundary of Mare Island as established officially by United States Surveyor General Wagner, or anyone, within his jurisdiction to so establish; that Exhibit "M" attached to and made a part of said answer of March 31, 1931, was neither a decision, nor within the jurisdiction, of United States Surveyor General Wagner; that Surveyor General

Wagner had no power to alter or modify said survey of Freeman.

XXV.

It is true that Exhibit "A" attached to defendants' Answer is a Coast Survey Chart, and Exhibit "B" attached to said Answer a Geological Survey Chart, and Exhibit "H" attached to said Answer an alleged township plat of 4 North, Range 4 West, M. D. B. & M., and that each of said Exhibits labels the northern or fan portion of Mare Island as "Island No. 1", but do not depict them as separate tracts of land or separate islands but all within a continuous mean high water line including both "Island No. 1" so called, and the lands [214] here in controversy, State Swamp and Overflowed Survey No. 34 so called; and that "Island No. 1" as set forth on said charts is a local place name of recent application; and that the lands in controversy here would fall partly on "Island No. 1" as designated on said charts; that each of said charts depicts Island No. 1 and Mare Island as separate tracts of firm land, though not as separate islands; that said plats, maps and surveys are official acts of plaintiff, duly authorized by law, and said Exhibit "H" was approved by the Secretary of the Interior. It is also true that it was no part of the duties or powers of the persons making said maps to impose local place names on said maps in such manner to prejudice the rights of the United States.

XXVII.

It is not true that said alleged grant was never finally confirmed to said Victor Castro or to his successors in interest. It is not true that the area or boundaries of said tract of land has never been determined or ascertained by survey thereof by the United States Surveyor General for California. It was surveyed by Freeman and the Freeman Survey was approved. It is true no patent thereof has issued to the confirmee or confirmees pursuant to the Act of Congress of July 1, 1864, or otherwise, but the court finds such patent unnecessary, as simply a confirmation by the United States to the United State, the transferee of the confirmees.

XXX.

It is not true that the patent of the United States to California, by relation or otherwise, is of the date of September 28, 1850, or is superior to the decrees of confirmation, [215] or superior to said Executive Orders purporting to reserve said premises for public uses of plaintiff, or that plaintiff is estopped to deny the validity of same.

It is true that the area of the premises conveyed to plaintiff by Bissell, Aspinwall and McArthur, January 4, 1853, was within the boundaries of the survey referred to in said conveyance and that said survey did include Island No. 1, so-called, as delineated on said charts, and the whole thereof, and included all parts of areas embraced in said Swamp and Overflow Survey No. 34 and some of the area

embraced in said Swamp and Overflow Survey No. 569. It is not true that the line depicted on Exhibit "N" as the line of the upland in 1852 was or is the northern boundary of Mare Island or the southern boundary of said premises embraced or claimed to be embraced in said Swamp and Overflow Survey No. 34, or that the northern line of Mare Island as there depicted is the Machine Shop depicted on said maps; that Exhibit "M" is not a copy of any decision of the United States Surveyor General for California relating to the Freeman Survey; but the Freeman Survey was a closed transaction and was finally approved at the time Exhibit "M" was written.

It is not true that a line drawn from Station 54 to Station 138 on the Freeman Survey constitutes the northern boundary of Mare Island or the southern boundary of any lands embodied or claimed to be embodied in said Survey No. 34, or the southern boundary of any Island No. 1, there being no such island as distinct from Mare Island.

XXXVI.

It is not true that the decisions and records in the suits of San Francisco Savings Union v. Irwin, or Bouldin [216] v. Phelps, are muniments of the title of these defendants or their co-tenants in title, or otherwise, in any controversy between any of said defendants or said co-tenants and the United States. None of the facts established in any of said suits are binding or conclusive on plaintiff herein.

XXXIX.

Exhibit "A" attached to defendants' answer is a Coast and Geodetic Survey in accord with the Freeman Survey and binding on plaintiff only so far as it shows the configuration of the coast, and the meanders of the mean high tide line which is the same as the Freeman Survey.

XLI.

That Exhibit "P" referred to and incorporated in said Answer filed March 31, 1931, was made and prepared by the United States Coast and Geodetic Survey pursuant to law in the manner and for the purposes depicted on its face to the extent authorized by Federal statutes and at the time stated on its face; but it is not true that any northern boundary of Mare Island or southern boundary of swamp and overflowed lands later established by State Segregation Swamp and Overflow Survey No. 34 or by any examinations made by the Secretary of the Interior or by any descriptions inserted in the Federal Patent to California, are depicted thereon or on any other surveys by said Coast and Geological Surveys of the United States, or was adopted by the Board of Officers sent to California to select a site for a Navy Yard or is a boundary survey of said area referred to in said Bissell conveyance, so-called to the United States. It is true that the plat of Township 4 N., R. 4 W., approved March 9, 1904, (Exhibit "F") was made under directions by the Secretary of [217] the Interior to compile

the same from maps on file in the Interior Department and from State segregations of swamp and overflowed lands in Napa and Sonoma Counties (the latter now Solano County), the same being State Swamp and Overflow Surveys Nos. 34 and 569, purportedly pursuant to the second clause of R. S. Sec. 2488, and also in accordance with directions contained in Interior Department letter "E" dated February 2, 1904. It is not true that the lands marked in red lines on said township plats are any part of any Island No. 1 but they are part of the lands covered by Swamp and Overflow Survey No. 569, all marked on said plat by the Surveyor, but not approved by the Secretary of the Interior, on the application of California for certification as alleged in paragraph 12 of said answer of March 31, 1931. It is not true that Exhibit "K" referred to and incorporated in said Answer (or plaintiff's Exhibit "L-16" in Evidence), is the survey of the Board of Officers sent to California to select a site for a Navy Yard nor is the only part conveyed and made part of said Mare Island by Bissell, Aspinwall and McArthur. That said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island. The survey referred to in said conveyance and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay. It is not true that Exhibit "K" (the Cutt's detailed drawing, so-called) is the controlling de-

scription of the conveyance from Bissell and Aspinwall to the United States nor that said survey follows the water's edge or the natural boundaries of Mare Island throughout their entire extent or embraces the entire area of Mare Island or all of the lands that were granted to Victor Castro [218] and by him conveyed to the predecessor in title to the United States. It is not true that the Navy Yard plan attached to said exhibit also shows the area of Mare Island or the southerly line of said Survey No. 34, nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

XLV.

* * * it is not true that any accretions, natural or artificial, appertaining or accruing to the premises included in Swamp and Overflow Survey No. 34 have become a part thereof nor that plaintiff has no right, title or interest therein, nor to any part thereof beyond or north of the line or parallel intersecting the northerly highland of Mare Island; whose northerly boundary is not the line of the upland, socalled, of Mare Island existing in 1852, shown on defendants' Exhibit "B", referred to and incorporated in said Answers, nor was said line the line established by the survey referred to by plaintiff's Exhibit "C"; nor was plaintiff at the time this action was filed, nor is it now, in possession of said survey. The survey and plat referred to in plaintiff's Exhibit "C" was the plat of Mare Island as inscribed on a chart of San Francisco Bay by

Cadwallader Ringgold, was used by Secretary Kennedy in making his selection of a site for a Navy Yard; by President Fillmore in reserving the same; and was thereafter duly recorded in the office of the United States Surveyor General for California, where it was apparently destroyed in the San Francisco fire of 1906.

XLVI.

It is not true that the grant by Juan B. Alvarado to Victor Castro did not embrace the premises described in [219] Swamp and Overflow Survey No. 34. It is true that the nunc pro tunc of the final confirmation of the claim of Bissell and Aspinwall was not followed by an official survey or patent as specified by the Act of March 2, 1851, and its Amendments, before the issue of the Federal patent to California, and in this connection the court finds that in 1877, pursuant to authority given him by law, the Surveyor General for California caused the land confirmed in the Bissell and Aspinwall confirmation to be surveyed by Freeman, and thereafter approved said survey; that said survey was thereafter duly approved by the Commissioner of the General Land Office, as hereinabove stated, and said approved survey was in all respects validated by said final decree of confirmation. It is not true that the claim of Victor Castro was inferior or subordinate in legal character to the Swamp and Overflow Land Grant of September 28, 1850, or to the Federal patent to the same by the plaintiff to Cali-

fornia, nor did said patent by relation become effective as of the date of September 28, 1850.

XLVII.

It is not true that the conveyance referred to in paragraph V of plaintiff's Bill of Complaint did not embrace the lands described in State Swamp and Overflow Survey No. 34, or any part thereof, but the said conveyance embraced all of said lands. It is not true that the executive order referred to in paragraph VI of plaintiff's Bill of Complaint did not embrace the premises covered in State Survey No. 34, or any part thereof. On the contrary, the court finds that said executive order embraced all of the lands covered by Swamp and Overflow Survey No. 34. [220]

L.

It is not true that the survey referred to in plaintiff's Exhibit "C", or the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff, but the court finds that the survey and plat referred to in the deed, the selection of Secretary Kennedy and the reservation of President Fillmore was Mare Island as shown on the chart of San Francisco Bay by Cadwallader Ringgold; that said chart used by President Fillmore in reserving Mare Island was duly recorded and preserved in the office of the United States Surveyor General of California and was destroyed in the fire of 1906.

It is not true that the United States Surveyor General for California in the exercise of his judg-

ment or discretion determined that the northerly boundary of Mare Island extended to a point or station on San Pablo Bay to a point or station on the Napa River, the first station being designated on Freeman's Survey as Station 34, to said second station No. 138. It is not true that said alleged decision, so-called, of said Surveyor General was never modified by the Secretary of the Interior or was in full force or effect on the day the said fee simple patent issued by the plaintiff to the State of California; nor is it true that the said line is the northern line of Mare Island or is the southern boundary line of said premises said Swamp and Overflow Survey No. 34, nor does the northern boundary of Mare Island closely approximate the parallel intersecting the northerly highlands of Mare Island as depicted on defendants' Exhibit "B".

[Endorsed]: Receipt of copy is hereby admitted this 14th day of October, 1939. Lodged Oct. 14, 1939. Filed Nov. 1, 1939.

McCUTCHEN, OLNEY,
MANNON & GREENE,
STONEY, ROULEAU,
STONEY & PALMER
Per ROBERT L. LIPMAN,
Attorneys for Defendants. [221]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial before the above entitled Court, the Honorable A. F. St. Sure, United States District Judge, presiding, upon complainant's "Amended Bill of Complaint" and the "Amendments to Amended Bill of Complaint" and upon the "Answer of Defendant James Irvine to [222] the Amended Bill of Complaint and to the Amendments Thereto" and the first and second amendments to said answer of said defendant and upon the "Answer of Defendants Mary W. Stewart, Sears Point Toll-Road Co., a corporation, American Trust Company, a corporation, Bay Land Company, a corporation, Field and Tule Land Company, a corporation, and West End Land Company, a corporation, to the Amended Bill of Complaint and to the Amendments Thereto" and the first and second amendments to said answer of said defendants, said second amendments to said answers having been filed with leave of court to conform to the proofs. The complainant and said answering defendants appeared by their respective counsel. A stipulation in lieu of answer was filed on behalf of defendant Pacific Gas and Electric Company. The action was, prior to trial and upon stipulation, dismissed with prejudice as to defendants Meta S. Healy (substituted as a defendant in the action in the place of defendant W. H. Healy, de-

ceased), Russ Investment Company, a corporation, (sued as Russ Investment Co., a corporation), Henry A. Kendal (sued as Henry A. Kendall), Joseph Dubeault, Wilfrid Debeault (sued as Wilfred Dubeault), and Charles J. Monahan, and as to the lands owned by said defendants described in the answers filed by said defendants and in the orders of dismissal as to said defendants. Prior to trial defendants Evadne B. Middlemas, Louise DeVoe Brickell, Crocker First Federal Trust Company (substituted as a defendant in the action in place of Howard Brickell, deceased,) Ida M. Brickell, Frank E. Knight, California Pacific Realty Company, a corporation, (sued as California Pacific Realty Co., a corporation), California Pacific Title & Trust Company, a corporation, (sued as California Pacific Title and Truist Co., a corporation) American Securities Company, a corporation, (sued as American Securities Co., a [223] corporation) and A. O. Stewart, sued as Fourth Doe, filed disclaimers in the action and as to said defendants the action is dismissed. The following named defendants, to-wit, Henry Claude Kettlemen, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe, having failed to appear in the action, decrees pro confesso were ordered against said defendants. Defendant James Clayton, sued as Second Doe, having died more than two years ago, the action as to said defendant is dismissed. Defendant Edmund Burke, sued as Tenth Doe, having died and

Walter E. Burke as administrator of the estate of said Edmund Burke having been substituted as a defendant in his place and stead and said Walter Burke having died more than two years ago, the action is as to said defendant dismissed. Defendants Eighth Doe, Ninth Doe and all other defendants not hereinabove specifically mentioned not being found or served, the action is as to them dismissed. The case was tried on June 8th, June 9th, June 11th, and June 15th, 1937, and evidence both oral and documentary having been introduced and received and briefs having been filed and the Court having, upon written stipulation, visited and viewed the lands and premises which are the subject of the action, and the cause having been submitted to the Court for consideration and decision, after due consideration thereof the Court makes its decision and its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

The Court now finds as follows:

1.

That the complainant, United States of America, is not the owner of and at no time subsequently to September 28, 1850, ever was the owner of the lands or any of the lands described [224] in Subdivision II of the Amended Bill of Complaint and has no right, title or interest in or to said lands or any thereof. That the following named defendants, to-wit, James Irvine, Pacific Gas and Electric Com-

pany (sued as Pacific Gas and Electric Co.), Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company (sued as American Trust Co.), Bay Land Company (sued as Bay Land Co.), Field and Tule Land Company (sued as Field and Tule Land Co.), and West End Land Company (sued as West End Land Co.), are, severally, the owners of those portions of the said lands described in said Subdivision II of the Amended Bill of Complaint (or of interests therein) more particularly described and set forth in Exhibit A attached to these Findings of Fact and Conclusions of Law and hereinafter referred to as "Exhibit A hereto", which is hereby made a part of these Findings of Fact and Conclusions of Law as fully as though herein set forth at length. That none of said last-mentioned defendants owns or has any right, title or interest in or to any of the lands described and referred to in Exhibit A hereto other than as stated and set forth in said Exhibit A hereto. That at no time subsequently to September 28, 1850, has complainant ever occupied said lands or any thereof, either as a part of the Mare Island Navy Yard Reservation, or for public or military or naval purposes or otherwise or at all, and that at no time since September 28, 1850, has complainant ever been in the possession of or entitled to the possession of said lands or any part thereof. That for forty years last past the said defendants owning, severally, those portions of said lands described in Subdivision II of the Amended Bill of Complaint as above stated and their respec-

tive predecessors in interest (other than complainant) have been in and entitled [225] to the possession of said lands so owned by them as aforesaid and their said possession of said lands has at all times been actual, open, notorious, under claim of right and under color of title and adverse to the complainant and to the whole world.

2.

That none of the following named defendants, to-wit, Henry Claude Kettleman, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe owns or has right, title or interest in or to the lands or any of the lands described in Subdivision II of the Amended Bill of Complaint or in or to the lands or any of the lands described and referred to in Exhibit A hereto.

3.

That all of the lands described in Subdivision II of the Amended Bill of Complaint were on September 28, 1850, unreserved and unsold public lands of the United States, and all of said lands were then swamp and overflowed lands, made unfit thereby for cultivation, within the purview and meaning of the Swamp Land Act (to-wit: "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits", 9 Stats. 519), and all of said lands were granted and passed

to the State of California under and by virtue of said Act. That the defendants named in paragraph 1 of these Findings of Fact are, severally, the successors in ownership and title to the State of California of portions of said lands, as more particularly stated and set forth in Exhibit A hereto.

4.

That on or about May 20, 1841, one Juan B. Alvarado, the then Constitutional Governor of the Department of California, [226] granted to one Victor Castro a tract of land known as "Isla de la Yegua" or Mare Island by an instrument in writing, a translation of which is attached to the Amended Bill of Complaint as Exhibit A. That said grant was, by the successors in ownership and title thereto of said Victor Castro, presented for confirmation to the Board of Land Commissioners empowered to ascertain and settle private land claims in the State of California pursuant to the provisions of the Land Commission Act of March 3, 1851 (to-wit: "An Act to ascertain and settle the private Land Claims in the State of California", 9 Stats. 631), and said grant was by said Board confirmed and, on appeal from said order of confirmation to the United States District Court for the Northern District of California, said grant and the Board's said order of confirmation were by the judgment and decree of said United States District Court confirmed. That complainant has acquired and succeeded to all of the right, title and interest of said Victor Castro

to said Mare Island and is now the owner of said Mare Island, having purchased the same for valuable consideration.

5.

That none of the lands described in Subdivision II of the Amended Bill of Complaint and more particularly none of the lands owned by any of the defendants as more particularly described and set forth in Exhibit A hereto was ever a part of Mare Island; that none of said lands was, either at the time of said grant to Castro or at the time of any of the aforesaid proceedings for the confirmation of said grant, a part of the lands known as or referred to as or by the name of Mare Island; that none of said lands was embraced in or covered by the aforesaid grant to said Victor Castro of Mare Island; that none of [227] said lands was ever occupied by or in the possession of said Victor Castro; that none of said lands was in the aforesaid proceedings confirming the said grant made to Victor Castro claimed as a part of or to be a part of Mare Island; that none of said lands was covered by or embraced within the aforesaid confirmation proceedings or the order of confirmation made by said Board of Land Commissioners or said judgment and decree of the United States District Court for the Northern District of California confirming said grant and said order of confirmation of said Board and none of said lands was confirmed by said Board or by said Court; and that none of said lands was purchased or acquired by the complainant in or as

a part of its purchase of said Mare Island. That a large portion of the lands owned by defendant James Irvine as described and set forth in Exhibit A hereto lies to the east and northeast of Dutchman's Slough, also known as Boat Cut-off; that said portion of said lands is more particularly shown upon the map attached to the answer of defendant James Irvine as Exhibit B thereto; that said Dutchman's Slough or Boat Cut-off is and ever since prior to the year 1841 has been a natural navigable body of water, cutting off all of said lands lying to the east and northeast thereof from all of the remaining lands described in Exhibit A hereto and all of the lands lying within said Mare Island Navy Yard Reservation.

6.

That in July, 1877, the Surveyor General of California appointed James E. Freeman, United States Deputy Surveyor, to make a survey and plat of the claim to Mare Island pursuant to the provisions of said Land Commission Act and the Act of July 1, 1864 (to-wit: "An Act to expedite the Settlement of [228] Titles to Lands in the State of California", 13 Stats. 332), and thereafter gave notice of the survey and plat made by said Freeman by publication as required by said Acts and retained in his office, for public inspection, the said survey and plat until more than ninety days from the date of the first publication of the aforesaid notice. That neither the said survey nor the said plat so made and pre-

pared by said Freeman was ever approved, either expressly or impliedly, by the Surveyor General of California, either as required by said Land Commission Act or by said Act of July 1, 1864, or otherwise or at all. That copies of said survey and said plat were thereafter transmitted by the Surveyor General of California to the Commissioner of the General Land Office. That neither the said survey nor the said plat was ever approved, either expressly or impliedly, by the Commissioner of the General Land Office, either as required by said Land Commission Act or by said Act of July 1, 1864, or otherwise or at all, and neither said survey nor said plat was ever used or acted upon by the Commissioner of the General Land Office as an approved survey or as an approved plat. That neither the said survey nor the said plat was ever approved, either expressly or impliedly, by the Secretary of the Interior, either as required by said Land Commission Act or by said Act of July 1, 1864, or otherwise or at all, and neither said survey nor said plat was ever used or acted upon by the Secretary of the Interior as an approved survey or as an approved plat. That neither the said survey nor the said plat has ever been approved as required by law or otherwise. That a large part, but not all, of the lands described in Subdivision II of the Amended Bill of Complaint are embraced within the exterior limits of said survey. [229]

7.

That on November 6, 1850, the President of the United States, by executive order, exempted and reserved from sale, for public purposes "Mare Island". That none of the lands described in Subdivision II of the Amended Bill of Complaint was included or embraced within the lands so exempted and reserved and none of said land was exempted or reserved from sale by said executive order or was subject to reservation at any time subsequently to September 28, 1850.

8.

That on February 11, 1853, the President of the United States, by executive order, reserved from sale, for public purposes, that tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said Island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same. That none of the lands described in Subdivision II of the Amended Bill of Complaint was included or embraced within the lands so exempted and reserved and none of said land was exempted or reserved from sale by said executive order or was subject to reservation at any time subsequently to September 28, 1850.

9.

That on June 5, 1896, the United States issued its patent to the State of California, known as Swamp

Land Patent No. 72, which said patent was issued under said Swamp Land Act, patenting to the State of California all of the lands described in Subdivision II of the Amended Bill of Complaint lying within Township 3 North, Range 5 West, M. D. B. & M. That on February 7, 1910, the [230] United States issued its patent to the State of California, known as Swamp Land Patent No. 152, which said patent was issued under said Swamp Land Act, patenting to the State of California all of the lands described in Subdivision II of the Amended Bill of Complaint lying within Township 4 North, Range 5 West, M. D. B. & M. That on April 26, 1924, the United States issued its patent to the State of California, No. 937055, which said patent was issued under said Swamp Land Act, patenting to the State of California all of the lands described in Subdivision II of the Amended Bill of Complaint lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. That each of said patents is in all respects valid and in full force and effect. That all of the lands of defendants West End Land Company and Field and Tule Land Company more particularly described in Exhibit A hereto and all those portions of the lands of defendants Bay Land Company and Sears Point Toll-Road Co. and that portion of the right of way and easement of defendant Pacific Gas and Electric Company described and referred to in said Exhibit A hereto lying in Townships 3 and 4 North, Range 5 West, M. D. B. & M. are embraced within and

are covered by said Swamp Land Patents Nos. 72 and 152.

10.

That the Mare Island Navy Yard Reservation (hereinafter for convenience referred to as said Mare Island Reservation) is a naval reservation of the United States, and the territory thereof is territory of the United States subject to the exclusive jurisdiction, dominion and sovereignty of the United States and not to the jurisdiction, dominion or sovereignty of the State of California. That such exclusive jurisdiction, dominion and sovereignty were acquired by the United States as follows: That on November 6, 1850, and again on February 11, 1853, the President of the United States, by executive order, reserved Mare [231] Island from sale and for public use as a navy yard and naval depot. That in addition, in 1853 the United States purchased the claims of certain private persons to said Mare Island and this purchase was consented to by the State of California by acts of her Legislature adopted April 27, 1852 (Cal. Stats. 1852, p. 149) and May 11, 1854 (Cal. Stats. 1854, p. 161). That by the act of the Legislature of the State of California of March 2, 1897 (Cal. Stats. 1897, p. 51) the State of California expressly ceded exclusive jurisdiction to the United States of all lands within said State held, occupied or reserved by the United States for military purposes or defense, which cession included the lands then occupied by the United

States as said Mare Island Reservation, said act requiring that a sufficient description of such lands be filed in the proper office of record in the counties in which the same were situated, and the United States, pursuant to said act, filed and recorded in the office of the County Recorder of the County of Solano (that being the county within the exterior boundaries of which said Mare Island Reservation is situate) a sufficient description of said Mare Island Reservation, said filing being a map showing the boundaries of said Mare Island Reservation, which map was recorded November 10, 1913, in Book 5 of Maps, page 4, Solano County Records. That none of the lands described or referred to in Subdivision II of the Amended Bill of Complaint was a part of said Mare Island so reserved or was held or occupied or reserved by the United States for military purposes or defense or was included or embraced within the description of said Mare Island Reservation or map thereof recorded by the United States as found above, nor was jurisdiction over any of said lands ceded by the State of California to the [232] United States. That the lands described in Subdivision II of the Amended Bill of Complaint are the lands embraced within that certain state segregation survey known as Swamp and Overflowed Land Survey No. 569 (hereinafter for convenience referred to as Survey 569). That beginning in the year 1890 and consistently ever since (except for the filing of this action on April 22, 1930) the United States has recognized that the

northwesterly boundary of said Mare Island Reservation did not extend beyond or to the north of the southeasterly boundary of said Survey 569. That said southeasterly boundary of said Survey 569 has been established, recognized and acquiesced in by the United States as the line beyond which said Mare Island Reservation did not extend, and at no time since 1890 has the United States asserted or attempted to assert or exercise jurisdiction, dominion or sovereignty over any of the lands within said Survey 569 as a part of said Mare Island Reservation. That on the contrary, ever since 1890 the State of California has, with the knowledge of and without objection by the United States, consistently asserted and exercised its jurisdiction over all of said lands as lands subject to its jurisdiction, dominion and sovereignty and as lands which were not within or a part of said Mare Island Reservation. That said southeasterly boundary line of said Survey 569 became the established, recognized and accepted public boundary line between said Survey 569 and said Mare Island Reservation in the manner next hereinafter set forth. That in the year 1853 the United States took possession of said Mare Island and commenced the establishment of a navy yard and navy depot thereon and has ever since occupied said Island as a reservation for naval purposes, with the consent of the State of California as hereinbefore found, and has exercised exclusive jurisdiction, [233] dominion and authority over said Mare Island and said naval reservation.

That on September 28, 1850 the United States by said Swamp Land Act granted to the State of California all unsold swamp and overflowed lands made unfit thereby for cultivation within said State, including, as a part thereof, all of the lands described and referred to in Subdivision II of the Amended Bill of Complaint, being the lands embraced within said Survey 569. That the southeasterly boundary line of the said lands and of the lands owned by defendants as set forth in Exhibit A hereto is the southeasterly boundary of said survey 569. That on or about the 7th day of April, 1874 the State of California having theretofore and in the year 1869 sold the lands in Survey 569 to one Jacob C. Hinckley, issued its patent for said land to one John W. Pearson, as assignee of said Hinckley, and thereafter the defendants named in paragraph 1 of these Findings of Fact by mesne conveyance acquired from said Pearson those portions of said Survey 569 owned by them as set forth in Exhibit A hereto. That the United States has never at any time occupied any portion of said Survey 569 nor has it at any time used any portion of said lands for any purpose in connection with said Mare Island Reservation nor has any portion of said Reservation been established or located thereon. That shortly prior to September 13, 1883 the then commandant of Mare Island Navy Yard, one John Irwin, asserted the right of such commandant to the possession of said Survey 569 as being property of the United States and excluded therefrom the predecessors in

interest of the defendants referred to in Exhibit A hereto. That thereupon and on September 13, 1883 said predecessors in interest of said defendants brought an action in ejectment against said Irwin for the recovery of said Survey 569. That said action was defended on [234] behalf of the United States and upon the ground that the lands of which said commandant had taken possession were a part of Mare Island and were owned by the United States as a part of said Mare Island Reservation. That on July 8, 1886 the United States Circuit Court for the District of California gave judgment in said action in favor of the plaintiffs therein and against said commandant, expressly finding and holding that the lands embraced in said Survey 569 were not a part of Mare Island and were not owned by the United States, but on the contrary that the plaintiffs in said action were the owners thereof as the successors in ownership and title to the State of California, as the grantee of the United States under the grant made by said Swamp Land Act. That the United States, in the name of said Irwin but on its own behalf, prosecuted an appeal from said judgment to the Supreme Court of the United States and on February 3, 1890 said judgment was affirmed by said last-mentioned Court. That ever since the affirmance of said judgment, until the commencement of this action, said judgment was and has been accepted by the United States and by the State of California and by all persons interested in said lands as conclusively

establishing that none of the lands in said Survey 569 was a part of Mare Island or was owned by the United States and until the commencement of this action on the 22nd day of April, 1930 the United States asserted no claim to any right or interest in said lands. That from the affirmance of said judgment to the commencement of this action the southeasterly boundary line of said Survey 569 has consistently been recognized by the United States as the public boundary line between said Mare Island Reservation and the territory subject to the jurisdiction, dominion and sovereignty of the State of California, to-wit, the lands described in Subdivision II of the Amended [235] Bill of Complaint, and the State of California has ever since the affirmance of said judgment consistently exercised jurisdiction, dominion and sovereignty over all of the lands embraced in said Survey 569, all as evidenced by the following acts among others:

(a) The State of California has consistently taxed the real and personal property in said Survey 569 each year since 1882; has included the lands therein in election districts and voting precincts; has exercised through its courts civil and criminal jurisdiction within said Survey 569; and has, through its subordinate instrumentalities, granted franchises for toll roads across said lands. In addition thereto, the predecessors in interest of the defendants named in paragraph 1 of these Findings of Fact have reclaimed large portions of the lands within said Survey 569, and for more than thirty

years prior to the filing of this action have been in the undisturbed possession and occupancy of said lands and have cultivated and lived on the same. The United States, on the other hand, has not attempted to take possession of any of the lands in said Survey 569, either as a part of said Mare Island Reservation or otherwise, nor has it attempted to exercise jurisdiction, dominion and sovereignty over any of said lands, as it has consistently done with respect to the lands within said Mare Island Reservation, but has permitted, without objection, the reclamation and cultivation of the lands to the north and west of said line by the aforesaid defendants and their predecessors in interest and the making of improvements thereon and the construction and use of toll roads, pipe lines and electric power lines across the same.

(b) In the year 1896 the then commandant of Mare Island Navy Yard and the then predecessors in interest of the defendants [236] named in paragraph 1 of these Findings of Fact jointly caused a survey to be made for the purpose of determining the location of the southeasterly boundary line of said Survey 569 as the public boundary line beyond which the said Mare Island Reservation did not extend, and upon the determination of such boundary line the then predecessors in interest of said defendants, to the knowledge and without objection by the United States, constructed a levee on said line, as so determined, for the purpose of reclaiming the land to the north thereof. Subsequently it

was discovered that the boundary line as so determined was erroneous and that the true southeasterly boundary line of said Survey 569 lay to the northwest of said line as theretofore established; whereupon, said boundary line was correctly located and thereafter and in December, 1914, the United States, with the acquiescence of the predecessors in interest of said defendants, erected and has ever since maintained a substantial post and wire fence along the true southeasterly boundary line of said Survey 569 as a boundary fence marking and indicating the line beyond which said Mare Island Reservation did not extend.

(c) That as hereinbefore found, on November 10, 1913, pursuant to said act of the Legislature of the State of California of 1897 ceding to the United States the exclusive jurisdiction over all lands within the State of California held, occupied or reserved by the United States for military purposes or defense, the United States filed and recorded in the office of the County Recorder of the County of Solano a map showing the boundaries of said Mare Island Reservation and upon said map the northwesterly boundary line of said Reservation is shown as the southeasterly boundary line of said Survey 569, as correctly located as in the preceding subparagraph (b) heretofore stated. [237]

(d) On June 5, 1896 the United States patented to the State of California all those portions of said Survey 569 lying in Township 3 North, Range 5 West, M. D. B. & M., and on February 7, 1910, the

United States patented to the State of California all those portions of Survey 569 lying in Township 4 North, Range 5 West, M. D. B. & M., by said Swamp Land Patents Nos. 72 and 152 respectively. Thereafter application was made for the issuance of a patent to the State of California of the lands embraced within said Survey 569 lying between the lands patented as above set forth and the southeasterly boundary line of said Survey 569, said lands being those lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. Upon such application being made the Secretary of the Interior under date of October 18, 1912 addressed a letter to the Secretary of the Navy requesting of him such data as might be in the latter's possession relative to the limits of the lands embraced in Mare Island, to the end that the matter of segregating the swamp and overflowed lands from said Mare Island might be considered. Under date of February 1, 1913 the Acting Secretary of the Navy addressed a reply to the Secretary of the Interior calling the latter's attention to the judgment in the action of ejectment against John Irwin hereinbefore mentioned, which held that the lands embraced within said Survey 569 were not a part of Mare Island and with said letter said Acting Secretary of the Navy forwarded to the Secretary of the Interior a map or plat showing the then limits of said Mare Island and showing that the northwesterly boundary line of said Mare Island Reservation did not extend beyond or to the north or west of

said southeasterly boundary line of said Survey 569. Thereafter the Department of the Interior directed that appropriate surveys be made of [238] said Townships 3 and 4 North, Range 4 West, M. D. B. & M., for the purpose of segregating the swamp and overflowed lands therein granted to the State of California by said Swamp Land Act and directed that such survey should be limited to the lands in said townships lying to the north and west of said southeasterly boundary line of said Survey 569 as established by the fence erected upon said boundary line by the United States as hereinbefore found. Such surveys were made and approved, and the Secretary of the Navy having expressed the view in a letter to the Secretary of the Interior, under date of June 4, 1923, that all of the lands lying within said Survey 569 had been lost to the United States by reason of the judgment in said ejectment suit against John Irwin hereinbefore referred to, the Department of the Interior ordered all of the lands embraced within said Survey 569 lying within Townships 3 and 4 North, Range 4 West, M. D. B. & M. to be patented to the State of California, and pursuant to said instructions said lands were patented to the State of California by patent dated April 26, 1924, and numbered 937055.

11.

That following the affirmance by the United States Supreme Court of the judgment in favor of the predecessors of the defendants named in para-

graph 1 of these Findings of Fact and against said John Irwin as found in paragraph 10 of these Findings of Fact one L. E. Cross purchased those portions of the lands embraced in said Survey 569 described and referred to in Exhibit A hereto and thereupon took possession thereof and in the year 1897 commenced the reclamation thereof by the construction of extensive levees and drainage works. That preliminarily to the construction of said levees and drainage works the then commandant of the Mare [239] Island Navy Yard and said Cross jointly caused a survey to be made for the purpose of determining the southeasterly boundary line of said Survey 569 in order that said Cross might construct a levee along said line and such levee was thereupon constructed by said Cross. That said levees and drainage works were completed by said Cross on or about the year 1899 and said Cross thereupon built roads and erected farm houses and other farm buildings on said lands, at a total cost of approximately $80,300, and commenced the farming and cultivation of a large part of the same, and such farming and cultivation by said Cross and his successors in interest has continued until the present time. That portions of said lands were, following the affirmance of said judgment, acquired and improved at very considerable expense by the defendants mentioned in Exhibit A hereto as follows: defendant James Irvine in 1928 purchased the lands owned by him as stated in Exhibit A hereto for the sum of $100,000 and since said date has ex-

pended $26,000 in the improvement thereof, which improvements were made or contracted for prior to the commencement of this action; defendant West End Land Company in 1923 purchased the lands owned by it as stated in Exhibit A hereto for the sum of $27,000 and since said date and prior to 1930 expended in excess of $25,000 in the improvement thereof; defendant Field and Tule Land Company about twenty years ago purchased the lands owned by it as stated in Exhibit A hereto paying from $25 to $35 per acre therefor and since said date and prior to the commencement of this action expended in excess of $22,500 in the improvement thereof; defendant Mary W. Stewart in 1928 purchased the lands owned by her as stated in Exhibit A hereto for the sum of $18,013.35; defendant Sears Point Toll-Road Co. commencing in 1926 purchased the lands owned by it as [240] stated in Exhibit A hereto and in 1928 completed the construction of a toll-road thereon at a total cost of between $180,000 and $190,000; and defendant Bay Land Company in 1920 purchased the lands owned by it as stated in Exhibit A hereto paying approximately $35 an acre therefor and since said date and prior to 1930 expended in excess of $22,500 in the improvement thereof. That ever since the predecessors in interest of the aforesaid defendants took possession of said lands following the affirmance of said judgment against said Irwin, they and their successors in interest have had and been in actual, open, visible, exclusive and undisturbed possession of said lands.

That each of the defendants who, as hereinabove found, purchased the lands owned by it as stated in Exhibit A hereto, made such purchase prior to the commencement of this action and for valuable consideration from the successors in interest of the State of California and each such purchase was made subsequently to the issuance by complainant of its patents to the State of California for said lands and in reliance upon said patents and without any knowledge or notice of any claim to said lands by or on behalf of the United States. That the defendants mentioned in paragraph 1 of these Findings of Fact, other than defendants American Trust Company and Pacific Gas and Electric Company, obtained title insurance upon the lands owned by them, respectively, as stated in Exhibit A hereto and that the title insurance companies which issued such title insurance would not have issued title insurance upon said lands had not the United States issued its patents for said lands, as heretofore found. [241]

CONCLUSIONS OF LAW.

The Court concludes:

1.

That this action is barred by the statute of limitations (Section 8 of the Act of March 3, 1891, 26 Stats. 1099, Title 43 U. S. C. Sec. 1166) as to all lands described in Exhibit A hereto embraced in said Swamp Land Patents 72 and 152, to-wit: All

of the lands described in said Exhibit A hereto lying in Townships 3 and 4 North, Range 5 West, M. D. B. & M., being all of the lands owned by defendants West End Land Company and Field and Tule Land Company and those portions of the lands owned by defendants Bay Land Company and Sears Point Toll-Road Co. and that portion of the right-of-way and easement owned by defendant Pacific Gas and Electric Company lying in Townships 3 and 4 North, Range 5 West, M. D. B. & M., as shown in said Exhibit A hereto.

2.

That neither the complainant, United States of America, nor any of the following named defendants, to-wit, Henry Claude Kettleman, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe, is the owner of or has any right, title or interest in or to the lands or any of the lands described in Subdivision II of the Amended Bill of Complaint or in Exhibit A hereto, but that defendants James Irvine, Pacific Gas and Electric Company, West End Land Company, Field and Tule Land Company, Bay Land Company, Mary W. Stewart, Sears Point Toll-Road Co. and American Trust Company are, severally, the owners of and have title to the lands described in Exhibit A hereto as in said Exhibit A stated and set [242] forth and

that said defendants are entitled to have their titles thereto quieted.

Dated November 1, 1939.

A. F. ST. SURE,
United States District Judge.

Approved as to form, as provided in Rule 22.

.....
United States Attorney,

.....
Assistant United States Attorney,
Attorneys for Complainant. [243]

EXHIBIT A

It is the fact and the Court finds that

[Printer's Note]: Here follows statement of lands owned by various defendants, including particular description of the lands owned by each, in identical form and content, as appears in Exhibit "A" to the Judgment. [244]

In the District Court of the United States for the Northern District of California, Southern Division.

In Equity

No. 2685-S

UNITED STATES OF AMERICA,

Complainant,

vs.

MARY W. STEWART, EVADNE B. MIDDLEMAS, LOUISE DeVOE BRICKELL, HOWARD BRICKELL, IDA M. BRICKELL, Heirs and Distributees of JOHN C. BRICKELL, Deceased, RUSS INVESTMENT CO., a corporation, SEARS POINT TOLL-ROAD CO., a corporation, FRANK E. KNIGHT, HENRY A. KENDALL, JOSEPH DUBEAULT, WILFRED DUBEAULT, CHARLES J. MONAHAN, W. H. HEALY, JAMES IRVINE, CALIFORNIA PACIFIC REALTY CO., a corporation, BAY LAND CO., a corporation, FIELD AND TULE LAND CO., a corporation, PACIFIC GAS AND ELECTRIC CO., a corporation, AMERICAN TRUST CO., a corporation, CALIFORNIA PACIFIC TITLE AND TRUST CO., a corporation, WEST END LAND CO., a corporation, AMERICAN SECURITIES CO., a corporation, HENRY CLAUDE KETTLEMAN, C. D. HILLMAN, sued as First Doe, JAMES CLAYTON, sued

as Second Doe, E. G. SWANBERG, sued as Third Doe, A. O. STEWART, husband of Mary W. Stewart, sued as Fourth Doe, J. C. AITKEN, sued as Fifth Doe, H. V. CASEBOLT, sued as Sixth Doe, H. W. DAVIS, sued as Seventh Doe, Eighth Doe, Nineth Doe, EDMUND BURKE, sued as Tenth Doe, also all other persons unknown claiming any right, title, estate, lien, or interest in the real property described in the Complaint, adverse to Complainant's title thereto,

Defendants.

JUDGMENT

The above entitled action came on regularly for trial before the above entitled Court, the Honorable A. F. St. Sure, United States District Judge, presiding, upon complainant's "Amended Bill of Complaint" and the "Amendments to Amended Bill of Complaint" and upon the "Answer of Defendant James Irvine to the [260] Amended Bill of Complaint and to the Amendments Thereto" and the first and second amendments to said answer of said defendant and upon the "Answer of Defendants Mary W. Stewart, Sears Point Toll-Road Co., a corporation, American Trust Company, a corporation, Bay Land Company, a corporation, Field and Tule Land Company, a corporation, and West End Land Company, a corporation, to the Amended Bill of Complaint and to the Amendments Thereto" and the first and second amendments to said answer

of said defendants, said second amendments to said answers having been filed with leave of court to conform to the proofs. The complainant and said answering defendants appeared by their respective counsel. A stipulation in lieu of answer was filed on behalf of defendant Pacific Gas and Electric Company. The action was, prior to trial and upon stipulation, dismissed with prejudice as to defendants Meta S. Healy (substituted as a defendant in the action in the place of defendant W. H. Healy, deceased), Russ Investment Company, a corporation, (sued as Russ Investment Co., a corporation), Henry A. Kendal (sued as Henry A. Kendall), Joseph Dubeault, Wilfrid Debeault (sued as Wilfred Dubeault), and Charles J. Monohan, and as to the lands owned by said defendants described in the answers filed by said defendants and in the orders of dismissal as to said defendants. Prior to trial defendants Evadne B. Middlemas, Louise DeVoe Brickell, Crocker First Federal Trust Company (substituted as a defendant in the action in place of Howard Brickell, deceased), Ida M. Brickell, Frank E. Knight, California Pacific Realty Company, a corporation, (sued as California Pacific Realty Co., a corporation), California Pacific Title & Trust Company, a corporation, (sued as California Pacific Title & Trust Co., a corporation), American Securities Company, a corporation, (sued as American Securi- [261] ties Co., a corporation) and A. O. Stewart, sued as Fourth Doe, filed disclaimers in the action and as to said defendants

the action is dismissed. The following named defendants, to-wit, Henry Claude Kettleman, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe, having failed to appear in the action, decrees pro confesso were ordered against said defendants. Defendant James Clayton, sued as Second Doe, having died more than two years ago, the action as to said defendant is dismissed. Defendant Edmund Burke, sued as Tenth Doe, having died and Walter E. Burke as administrator of the estate of said Edmund Burke having been substituted as a defendant in his place and stead and said Walter Burke having died more than two years ago, the action is as to said defendant dismissed. Defendants Eighth Doe, Ninth Doe and all other defendants not hereinabove specifically mentioned not being found or served, the action is as to them dismissed. The case was tried on June 8th, June 9th, June 11th, and June 15th, 1937, and evidence both oral and documentary having been introduced and received and briefs having been filed and the Court having, upon written stipulation, visited and viewed the lands and premises which are the subject of the action, and the cause having been submitted to the Court for consideration and decision, after due consideration thereof the Court having made and caused to be filed its written Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

1.

That defendants James Irvine, Pacific Gas and Electric [262] Company, Mary W. Stewart, Bay Land Company, Field and Tule Land Company, West End Land Company, Sears Point Toll-Road Co. and American Trust Company are, severally, the owners of those certain lands (or interests therein) more particularly described and set forth in Exhibit A attached to this judgment and hereby made a part hereof as fully as though herein set forth at length, and their said rights and interests are hereby declared and established.

2.

That neither the complainant, United States of America, nor any of the following named defendants, to-wit, Henry Claude Kettleman, C. D. Hillman, sued as First Doe, E. G. Swanberg, sued as Third Doe, J. C. Aitken, sued as Fifth Doe, H. V. Casebolt, sued as Sixth Doe, H. W. Davis, sued as Seventh Doe, owns or has any right, title or interest in or to the lands or any of the lands described in said Exhibit A hereto, and that complainant and said last mentioned defendants are, and each of them is, hereby perpetually enjoined and debarred from claiming or asserting any right, title or interest in or to the said lands described in Exhibit A hereto, or any part thereof.

Dated this 1st day of November, 1939.

A. F. ST. SURE,
United States District Judge. [263]

EXHIBIT A

(a) Defendant James Irvine is the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, State of California, more particularly described as follows, to-wit:

Commencing at the point of intersection of the *quarter section line running* north and south through the middle of Sec. 31, T. 4 N. R. 4 W., with the boundary line between Napa and Solano Counties, and running thence north along said quarter section line to the middle of South Slough; thence in a easterly, southerly and easterly direction following the center line of said South Slough, to the westerly shore of Napa Bay; thence southerly along the shore of said Napa Bay to the northerly line of S. & O. Survey No. 34; thence westerly along the north line of S. & O. Survey No. 34 to the northwest corner thereof; thence south along the west line of said S. & O. Survey #34, to San Pablo Bay; thence northwesterly along the shore of said San Pablo Bay to its point of intersection with the quarter section line running north and south through the middle of Sec. 6, T. 3 N. R. 4 W.; thence north along the middle quarter section line of said Sec. 6 and Sec. 31 to the place of beginning, containing 3524.15 acres, more or less and being 57.15 acres in Napa County and 3467 acres in Solano County. Ex-

cepting therefrom that portion conveyed by Mary W. Stewart and A. O. Stewart to Sears Point Toll-Road Company, dated Nov. 3, 1926, recorded Apr. 1, 1927, in Book 288 of Deeds, at page 434.

Defendant Pacific Gas and Electric Company is the owner of the right of way and easement for transmission line purposes over the above described lands granted by that certain right of way deed dated May 8, 1911, from Lester E. Cross, as grantor, to defendant Pacific Gas and Electric Company, as grantee, recorded in the office of the County Recorder of the County of Napa, State of California, on May 15, 1911, in Volume 100 of Deeds at page 286 and also recorded in the office of the County Recorder of the County of Solano, State of California, on May 26, 1911, in Liber 192 of Deeds at page 53.

(b) Defendant Mary W. Stewart is the owner in fee [264] simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the County of Solano, State of California, more particularly described as follows, to-wit:

All that portion of the West half of Section 31, T. 4 N. R 4 W., lying South of South Slough and within Solano County.

Also the fractional West half of Section 6, T. 3 N. R. 4 W., lying within the boundary of Swamp & Overflowed Land No. 569; said par-

cels being a portion of Swamp and Overflowed Lands, Survey No. 569 and situate on Cross Island.

Excepting therefrom the following described premises known as Sears Point Toll Road, described as follows: Beginning at the point of intersection of the easterly boundary line of the West ½ of fractional Section 6, with the surveyed line of said Toll Road, said point being Engineer's Station 220 + 91.13 of said surveyed line and running thence N. 65° 50′ 30″ W. 311.56 feet to Engineer's Station 224 + 02.69; thence along a curve to the left of radius of 20,000 feet 523.60 feet to Engineer's Station 229 + 26.29; thence N. 67° 20′ 30″ W. 939.15 feet to Engineer's Station 238 + 65.44; thence along a curve to the right of radius of 2000 feet; 379.12 feet to Engineer's Station 242 + 44.56; thence N. 56° 29′ 10″ W. 815.87 feet to Engineer's Station 250 + 60.43, being a point on the westerly boundary line of fractional Section 6, from which the meander corner of Lot 1, Section 6, T. 3 N. R. 4 W., M. D. B. & M., bears S. 0° 01′ E. 352.63 feet along said Section line, said strip of land containing 6.82 acres, more or less. Excepting also that portion lying within County Road.

Defendant Pacific Gas and Electric Company is the owner of the right of way and easement for transmission line purposes over the above described

lands granted by the right of way deed mentioned in paragraph (a) of this Exhibit A.

(c) Defendant Sears Point Toll-Road Co., a corporation, is the owner in fee simple absolute (subject to the Trust Indenture and Supplemental Trust Indenture to defendant American Trust Company hereinafter mentioned) of all that certain real property situate, lying and being in the County of Solano, State [265] of California, and more particularly described as follows, to-wit:

Parcel "D":

Tract (1) Beginning at the Meander corner of the United States Public Land Surveys, common to Tract No. 38 (Mare Island Navy Yard) and fractional Section 10 T. 3 N. R. 4 W. Mount Diablo Base and Meridian, on the westerly bank of Napa River; and running thence S. 64° 45′ W. 1090.32 feet along the Northern boundary line of said Tract No. 38 to an angle point in said boundary line; thence continuing along said boundary line N. 89° 56′ 30″ W. 1950 feet to the most northwesterly corner of said Tract No. 38; thence, leaving said boundary line, N. 0° 03′ 30″ E. 170.42 feet to a point 95 feet northerly at right angles from the surveyed line for the Toll Road of Sears Point Toll Road Co. at Engineers Station 58 + 72.79 thereof; thence S. 89° 56′ 30″ E. 1416.69 feet; thence along a curve to the left of radius 870 feet, 384.13 feet; thence North 64° 45′ E. to the line of mean lower low water along the

westerly bank of Napa River; thence southerly along said line of mean lower low water to the point of intersection thereof with a line extending N. 64° 45′ E. through said Meander Corner; and thence S. 64° 45′ W. along the last described line extending through said Meander Corner to the point of beginning; containing 15.09 acres (more or less); and being a portion of said fractional section 10 and the accretion on the Napa River frontage, and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California.

Tract (2) A strip of land of the uniform width of 160 feet, described as follows, to-wit:

Beginning at a point 65′ distant, measured southerly at right angles to the surveyed line hereinafter described, from Engineers Station 58 + 72.79 of the surveyed line for the Toll Road of Sears Point Toll Road Co., said point being N. 0° 03′ 30″ E. 10.42 feet distant from the most northwesterly corner of Tract 38, U. S. Public Land Surveys (Mare Island Navy Yard) and being on the westerly boundary of Tract No. 1, hereinabove described; and running thence parallel to said surveyed line, N. 89° 56′ 30″ W. 1431.84 feet to a point from which the corner common to fractional sections 9, 10, 15 and 16, T. 3 N. R. 4 W. M. D. B. & M., bears S. 0° 03½′ W. 1281.05 feet distant; thence continuing on the same course, N. 89°

56′ 30″ W. 1175.70 feet; thence westerly along a curve to the right having a radius of 1030 feet, for a distance of 577.05 feet; thence N. 32° 09′ 30″ E. 160 feet; thence easterly along a curve to the left for a distance of 487.42 feet, said curve having a radius of 870 feet, and being parallel to the southerly boundary above described; thence S. 89° 56′ 30″ E. 2607.54 feet, to a point 95′ distant, measured at right angles to said surveyed line, northerly from said Engineers Station 58 + 72.79 of said surveyed line; thence southerly 160 feet at right angles to said surveyed line to the point of beginning; situate in and being a part of fractional section 9 and 10, T. 3 N., R. 4 W. M. D. B. & M., and being a part of Swamp and Overflow Land Survey No. 569, Solano County, California, and containing 11.64 acres (more or less). [266]

Tract (3) Beginning at the most southwesterly corner of Tract 2 of Parcel D described above; and running thence N 32° 09′ 30″ E. along the westerly boundary of said Tract No. 2, for a distance of 130 feet to a point on said boundary; thence N 57° 50′ 30″ W. 2455.46 feet; thence along a curve to the left having a radius of 10,100 feet for a distance of 540.59 feet; thence N 60° 54′ 30″ W. 2149.57 feet; thence along a curve to the left having a radius of 20,100 feet for a distance of 321.58 feet; thence N 61° 49′ 30″ W. 1622.51 feet; thence

along a curve to the left having a radius of 20,100 feet for a distance of 923.84 feet; thence N 64° 27′ 30″ W. 986.52 feet; thence along a curve to the right having a radius of 9,900 feet for a distance of 492.45 feet; thence N 61° 36′ 30″ W. 1332.62 feet to a point which bears N 28° 23′ 30″ E. 100 feet distant from Engineers Station 198 + 67.0 of the survey for Toll Road as surveyed for Sears Point Toll Road Co., thence S 28° 23′ 30″ W. 130 feet; thence S 61° 36′ 30″ E., 1332.62 feet; thence along a curve to the left having a radius of 10,030 feet for a distance of 498.91 feet; thence S 64° 27′ 30″ E. 986.52 feet; thence along a curve to the right having a radius of 19,970 feet for a distance of 917.86 feet; thence S 61° 49′ 30″ E. 1622.51 feet; thence along a curve to the right having a radius of 19,970 feet for a distance of 318.49 feet; thence S 60° 54′ 30″ E. 2149.57 feet; thence along a curve to the right having a radius of 9,970 feet for a distance of 533.63 feet; thence S 57° 50′ 30″ E. 2455.46 feet to the point of beginning; said parcel being a strip of land of a uniform width of 130 feet extending from the westerly boundary of Tract No. 2, hereinbefore described, to a line at right angles to the surveyed line of Toll Road for Sears Point Toll-Road at Engineers Station 198 + 67 thereof, and said Tract No. 3, containing 32.29 acres more or less.

Tract (4) A strip of land of the uniform width of 160 feet, extending from the westerly boundary line of Tract No. 3, hereinbefore described, which is a line at right angles to the surveyed line for the Toll Road of Sears Point Toll Road Co. at Engineers Station 198 + 67 thereof, to the westerly boundary line of the lands now or formerly belonging to Eva L. Ricks, said boundary line of the lands of Eva L. Ricks being the easterly boundary line of the West one-half of fractional section 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian, and is the division line between said lands of Eva L. Ricks and lands now or formerly belonging to Henry Claude Kettleman, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from said surveyed line for Toll Road between said line at right angles to said surveyed [267] line of Engineers Station 198 + 67 and said easterly boundary line of the West one-half of fractional section 6, the point of intersection of said one-half section line and said surveyed line for Toll Road being Engineers Station 220 + 91.13 thereof, the northerly boundary line of said strip being parallel to and 130 feet distant at right angles northerly from said surveyed line for Toll Road between said line at right angles to said surveyed line at Engineers Station 198 + 67 and said easterly boundary line of the West one-half of fractional section 6; said strip

of land containing 8.17 acres (more or less) situate in and being a part of the East one-half of said fractional section 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian and of Swamp and Overflow Land Survey No. 569, Solano County, California; the portion of said surveyed line hereinabove mentioned being described as follows, to-wit: Beginning at Engineers Station 198 + 67 and running thence N 61° 36′ 30″ W. 433.40 feet to Engineers Station 202 + 90.40; thence northwesterly along a curve to the left, of radius 2000 feet, 244.93 feet to Engineers Station, 205 + 35.33; thence N. 68° 37′ 30″ W. 718.34 feet to Engineers Station 212 + 53.67; thence northwesterly along a curve to the right, or radius 10000 feet, 485.75 feet to Engineers Station 217 + 39.42; thence N 65° 50′ 30″ W. 351.71 feet to Engineers Station 220 + 91.13 a point on the easterly line of the West one-half of fractional section 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian; the beginning point of the above described portion of said survey line for Toll Road being located and defined as follows, to-wit: Commencing at the meander corner common to fractional sections 5 and 6 T. 3 N. R. 4 W. Mount Diablo Base and Meridian; and running thence N 0° 06′ W. 403.5 feet to Engineers Station 191 + 68.70 of said surveyed line for Toll Road, thence along said surveyed line N 61° 36′ 30″ W.

698.30 feet, to said Engineers Station 198 + 67, to the point of beginning.

Parcel "E": A strip of land of the uniform width of 100 feet extending from the easterly boundary line of the West ½ of fractional Section 6, T. 3 N. R. 4 W. M. D. M., to the westerly boundary line thereof, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Co. and the northerly boundary line of said strip being parallel to and 70 feet distant at right angles northerly from said surveyed line of Toll Road, said surveyed line for Toll Road of Sears Point Toll Road Co. being as described in the survey and description of the route and of the land necessary for the said Toll Road, recorded by the Commissioners in the Matter of the said Toll [268] Road in the Office of the County Clerk of Solano County, California, April 15th, 1926, and reported to and approved by the Board of Supervisors of said Solano County on the said 15th day of April, 1926, and entered of record in the journal of the said Board of Supervisors, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at a point of intersection of said easterly boundary line of the West ½ of fractional section 6, with said surveyed line, said point being Engineers' Station 220 + 91.13

of said surveyed line, and running thence N 65° 50′. 30″ W. 311.56 feet to Engineers' Station 224 + 02.69, thence along a curve to the left of radius 20,000 feet, 523.60 feet to Engineers' Station 229 + 26.29, thence N 67° 20′ 30″ W. 939.15 feet to Engineers' Station 238 + 65.44, thence along a curve to the right of radius of 2000 feet, 379.12 feet to Engineers' Station 242 + 44.56, thence N 56° 29′ 10″ W. 815.87 feet to Engineers' Station 250 + 60.43 being a point on said westerly boundary line of fractional section 6, from which the meander corner of Lot 1, Sec. 6, T. 3 N. R 4 W, M. D. B. & M., bears S 0° 01′ E. 352.63 feet along said Section line, said strip of land containing 6.82 acres, more or less.

Parcel "F": A strip of land of the uniform width of 100 feet extending from the westerly boundary line of Fractional Section 6, T. 3 N. R. 4 W., M. D. B. & M., to the easterly boundary line of lands now or formerly belonging to Bay Land Company, the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Co. and the northerly boundary line of said strip being parallel to and 70 feet distant at right angles northerly from said surveyed line for Toll Road, said surveyed line for Toll Road of Sears Point Toll Road Company being as described in the survey and description

of the route and of the land necessary for the said Toll Road, recorded by the Commissioners in the matter of the said Toll Road, in the Office of the County Clerk of Solano County, California, April 15, 1926, and reported to and approved by the Board of Supervisors of said Solano County on the said 15th day of April 1926, and entered of record on the journal of the said Board of Supervisors, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at the point of intersection of said westerly boundary line of fractional section 6 which line bears S 0° 01′ E. with said surveyed line for Toll Road at Engineers' Stationn 250 + 60.43 thereof from which Station the meander corner of Lot 1, Sec. 6, T. 3 N. R. 4 W., M. D. B. & M., bears [269] S 0° 01′ E. 352.63 feet distant, and running thence along said surveyed line N 56° 29′ 10″ W. 127.57 feet to Engineers' Station 251 + 88, thence along a curve to the left of radius 2000 feet, 68.55 feet to Engineers' Station 252 + 56.55 being a point on the said easterly boundary line of lands now or formerly belonging to Bay Land Company, which line bears N 0° 07½′ W. said strip of land containing 0.45 acres, more or less.

Parcel "G": A strip of land of the uniform width of 100 feet extending from the westerly boundary line of lands now or formerly belonging to John C. Brickell which line bears

N 0° 07½′ W. to the easterly boundary line of lands now or formerly belonging to Field and Tule Land Company which line bears N 0° 32½′ W. the southerly boundary line of said strip being parallel to and 30 feet distant at right angles southerly from the surveyed line for the Toll Road of Sears Point Toll Road Company, and the northerly boundary line of said strip of land being parallel to and 70 feet northerly at right angles from said surveyed line for Toll Road; said surveyed line for Toll Road of Sears Point Toll Road Co. being as filed in the office of the County Clerk of Solano County, California, on the 15th day of April 1926, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at Engineers Station 252 + 56.35 being a point on said westerly boundary line of lands of John C. Brickell and running thence along a curve to the left of radius 2000 feet, 293.71 feet to Engineers Station 255 + 50.06; thence N 66° 51′ 30″ W., 2929.94 feet to Engineers Station 284 + 80, being a point on said easterly boundary line of lands of Field and Tule Land Company; said strip of land containing 7.40 acres (more or less) situated in and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California, said point of beginning, station 252 + 56.35 being located and defined as follows,

to-wit: Commencing at the Meander Corner common to fractional section 6, T 3 N. R 4 W., and fractional section 1, T 3 N, R 5 W., Mount Diablo Base and Meridian and running thence N 0° 01′ W., 352.63 feet to Engineers Station 250 + 60.43 of said surveyed line of Toll Road, thence along said line N 56° 29′ 10″ W. 127.57 feet to Engineers Station 251 + 88; thence along a curve to the left of radius 2000 feet, 68.55 feet to said point of beginning, also the right to take from the 60 feet next adjoining the North boundary of said right of way, the material necessary for road construction and maintenance.

Parcel "H":

Tract (1). A strip of land of the uniform width of 100 feet extending from the westerly line of lands now or formerly belonging to Bay Land Com- [270] pany, which line bears North 0° 32½′ West, to the easterly line of lands now or formerly belonging to West End Land Company, which line bears North 0° 7½′ West, the southerly boundary line of said strip being parallel to and thirty feet distant at right angles southerly from the surveyed line for the Toll-Road of Sears Point Toll-Road Co., and the northerly boundary line of said strip being parallel to and 70 feet distant at right angles northerly from said surveyed line for Toll-Road, the portion of said surveyed line hereinabove referred to being described as follows.

to-wit: Beginning at the point of intersection of said westerly line of land of Bay Land Company with said surveyed line at Engineers Station 284. + 80 thereof, and running thence North 66° 51′ 30″ West 167.89 feet to Engineers Station 286 + 47.89, thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32, thence North 59° 06′ 40″ West, 817.35 feet to Engineers Station 297 + 35.67, thence along a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station 301 + 65.82; thence North 71° 26′ West 1527.36 feet to Engineers Station 316 + 93.18, thence along a curve to the right having a radius of 1000 feet for a distance of 365.96 feet to Engineers Station 320 + 59.14, thence North 50° 28′ West 336.31 feet to Engineers Station 323 + 95.45, thence along a curve to the left having a radius of 3000 feet for a distance of 352.99 feet to Engineers Station 327 + 48.44, thence North 57° 12′ 30″ West 1014.2 feet to Engineers Station 337 + 62.64, being a point on said easterly line of lands of West End Land Company, said point of beginning being located and defined as follows, to-wit: Commencing at the meander corner common to fractional section 6, Township 3 North, Range 4 West and fractional Section 1, Township 3 North, Range 5 West, Mount

Diablo Base and Meridian, and running thence North 0° 01′ West 352.63 feet to Engineers Station 250 + 60.43 on said surveyed line of Toll-Road, thence along said surveyed line North 56° 29′ 10″ West 127.57 feet to Engineers Station 251 + 88, thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 50.06, thence North 66° 51′ 30″ West, 2929.94 feet to Engineers Station 284 + 80, being said point of beginning, said strip of land containing 12.12 acres (more or less) situate in and being a portion of Swamp and Overflow Land Survey No. 569, Solano County, California.

Tract (2) The right or easement to take earth and soil for the construction, maintenance and repair of the Toll Road to be constructed by Sears Point Toll-Road Co.,—extending along the [271] property described as Tract (1) of Parcel "H" above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet, extending the entire length of the property above described, the southerly boundary of said strip of land being the northerly boundary of Tract (1) of Parcel "H" described, and the northerly boundary of said strip of land hereby described being parallel to and 60 feet distant at right angles northerly at all points from said northerly boundary of (Tract

(1) of Parcel "H" above described); containing 7.28 acres, more or less.

Parcel "I": All that portion of that certain real property situated in the County of Solano, State of California, described as follows, to-wit:

Tract (1) A strip of land of the uniform width of 100 feet extending from the westerly boundary line of the lands now or formerly belonging to the Field and Tule Land Company, which line bears N. 0° 07½′ West to the line of mean lower low water in Sonoma Creek, the southerly boundary of said strip of land being parallel to and thirty feet distant at right angles southerly from the surveyed line for the Toll-Road of Sears Point Toll Road Co., and the northerly boundary of said strip of land being parallel to and distant one hundred feet at right angles northerly from said southerly boundary of the herein described strip of land, the portion of said surveyed line hereinabove referred to being described as follows, to-wit: Beginning at the point of intersection of the westerly line of said lands now or formerly belonging to Field and Tule Land Company with the said surveyed line of Toll-Road at Engineers Station "C" 337 + 62.64, and running thence North 57° 12′ 30″ W. 1205.92 feet to Engineers Station "C" 349 + 68.56, thence along a curve to the left having a radius of 3000 feet for a distance of 635.23 feet to Engineers Station "C" 356 + 03.79 which equals

Station 356 + 18.87, thence North 69° 20′ 30″ West, 194.25 feet to Engineers Station 358 + 13.12, thence along a curve to the left, having a radius of 2000 feet, for a distance of 92.02 feet to Engineers Station 359 + 05.14, thence North 71° 58′ 40″ West 1326.40 feet to Engineers Station 372 + 31.54, thence along a curve to the left having a radius of 2000 feet for a distance of 157.46 feet to Engineers Station 373 + 89, thence North 76° 29′ 20″ West, 1981.20 feet to Engineers Station 393 + 70.20, thence along a curve to the right having a radius of 2000 feet for a distance of 457.67 feet to Engineers Station 398 + 27.87, thence North 63° 22′ 40″ West, 1034.44 feet to Engineers Station 408 + 62.31, thence along a curve to the left having a radius of 1000 feet for a distance of 471.33 feet to Engineers Station 413 + 33.64, thence South 89° 37′ [272] West parallel to the northerly boundary of Solano County, 48.42 feet to Engineers Station 413 + 82.06, which equals Station 413 + 91.11, from which Station a 6″ x 6″ post on said County boundary bears North 43° 34′ West, 86.2 feet; thence continuing on said course South 89° 37′ West parallel to and distant 62 feet at right angles southerly from said northerly boundary line of Solano County to the line of mean lower low water on the easterly side of Sonoma Creek, the beginning point of said portion of surveyed line, Station 337 + 62.64, being located and

defined as follows, to-wit: Commencing at the meander corner on the westerly boundary line of fractional section 6, T 3 N, R 4 W, Mount Diablo Base and Meridian, and running thence North 0° 01′ West, 352.63 feet to Engineers Station 250 + 60.43, on said surveyed line of Toll-Road, thence along said surveyed line North 56° 29′ 10″ West, 127.57 feet to Engineers Station 251 + 88, thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 50.06, thence North 66° 51′ 30″ West, 3097.83 feet to Engineers Station 286 + 47.89, thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32; thence North 59° 06′ 40″ West, 817.35 feet to Engineers Station "C" 297 + 35.67, thence along a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station "C" 301 + 65.82, thence North 71° 26′ West 1527.36 feet to Engineers Station "C" 316 + 93.18, thence along a curve to the right having a radius of 1000 feet for a distance of 365.96 feet, to Engineers Station "C" 320 + 59.14, thence North 50° 28′ West 386.21 feet to Engineers Station "C" 323 + 95.45, thence along a curve to the left having a radius of 3000 feet for a distance of 352.99 feet to Engineers Station "C" 327 + 48.44, thence North 57° 12′ 30″ West, 1014.20 feet to Engineers Station "C" 337 + 62.64,

being a point on the easterly line of lands of West End Land Company, and being said point of beginning; said above described strip of land containing 18.20 acres (more or less) situate in and being a part of Swamp and Overflow Survey No. 569, Solano County, California.

Tract (2) The right or easement to take earth and soil for the construction, maintenance and repair of the Toll-Road to be constructed by Sears Point Toll-Road Co., extending along the property described in Tract (1) of Parcel "I" above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet extending from the westerly boundary line of lands now or formerly belonging to the Field and Tule Land Company, which line bears North 0° 7½′ West, to the line of mean lower [273] low water in Sonoma Creek, the southerly boundary line of said strip of land being the northerly boundary of Tract (1) in Parcel "I" above described, and the northerly boundary of said strip of land hereby described being parallel to and 60 feet distant at right angles northerly at all points from the above described southerly boundary of said strip of land hereby described, containing 10.92 acres, more or less.

Defendant American Trust Company, a corporation, is the owner and holder of the interest in the above described real property conveyed to it under that

certain Trust Indenture from Sears Point Toll-Road Co. to American Trust Company dated as of June 1, 1926, and recorded on March 1, 1927 in the office of the County Recorder of said County of Solano, State of California, in Liber 43 of Trust Deeds at page 205, and under and by virtue of that certain Supplemental Trust Indenture dated as of June 1, 1927, and recorded on June 29, 1927, in the office of said County Recorder of said County of Solano, State of California, in Liber 292 of Deeds at page 403.

(d) Defendant Bay Land Company, a corporation, is the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, State of California, more particularly described as follows, (excepting from the land described those portions thereof lying in Section 25, Township 4 North, Range 5 West and Section 30, Township 4 North, Range 4 West, M. D. B. & M.), to-wit:

> Beginning at a point on the boundary line between Solano and Napa Counties, which point is on the West line of Section 31, Township 4 North, Range 4 West, Mount Diablo Base and Meridian, as said section line was re-established by E. N. Eager, County Surveyor, in February 1915, and is 397.25 chains West of the West line of Section 36, in Township 4 North, Range 4 West, Mount Diablo Base and Meridian; thence from said point of beginning South

102.90 chains to the shore of San Pablo Bay; thence along said shore line in a westerly direction about 48 chains to a point [274] which is 44.00 chains West of the West line of said Section 31; thence North 0° 25' West 66.40 chains to the middle of South Slough, at a point which is 44.50 chains West of the West line of said Section 31; thence along the middle of said South Slough in a northerly direction about 18 chains to the County boundary line; thence follow the middle of said South Slough, northerly, easterly and southerly about 150 chains to said County boundary line again; thence along same North 89° 25' West 14.50 chains to the place of beginning.

Containing 630.50 acres, more or less.

Excepting therefrom that portion of the above described tract heretofore conveyed to Sears Point Toll-Road Co.

Defendant Pacific Gas and Electric Company is the owner of the right of way and easement for transmission line purposes over the above described lands granted by the right of way deed mentioned in paragraph (a) of this Exhibit A.

(e) Defendant Field and Tule Land Company, a corporation, is the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, State of California, more particularly

described as follows (excepting from the land described that portion thereof lying in Section 25, Township 4 North, Range 5 West, M. D. B. & M.), to-wit:

Commencing at a point on the boundary line between said Solano and Napa Counties, which point is 154.25 chains West of the quarter-section line running North and South through the middle of Section 31, Township 4 North, Range 4 West, Mount Diablo Base and Meridian, which said quarter-section line was re-established by E. N. Eager, County Surveyor, in February, 1915, and is 357.25 chains West of the West line of Section 36, Township 4 North, Range 4 West, Mount Diablo Base and Meridian; thence from said point of commencement North 14.40 chains to the South bank of Huichica Creek; thence along same in an easterly direction about 63 chains to the middle of South Slough; thence along said South Slough, southerly and easterly about 42 chains to a point which is 84.50 chains West of said quarter-section line running North and South through the [275] middle of said Section 31; thence South 0 degrees 25 minutes E. 66.40 chains to the shore of San Pablo Bay; thence along said shore line northwesterly about 61 chains to the southeasterly corner of that certain 472.46 acre tract of land conveyed by John C. Brickell (an unmarried man) to Bay Land Company, a corporation, by deed dated May 20,

1921, and recorded in the office of the County Recorder of the County of Solano on June 17, 1921, in Liber 254 of Deeds at page 453 and also recorded in the office of the County Recorder of the County of Napa on June 21, 1921, in Liber 132 of Deeds at page 260, and thence North and along the East boundary of land so conveyed to Bay Land Company 45 chains to the point of commencement, containing 500 acres.

Excepting therefrom that portion of the above described tract heretofore conveyed to Sears Point Toll-Road Co.

Defendant Pacific Gas and Electric Company is the owner of the right of way and easement for transmission line purposes over the above described lands granted by the right of way deed mentioned in paragraph (a) of this Exhibit A.

(f) Defendant West End Land Company, a corporation, is the owner in fee simple absolute (subject to the right of way and easement hereinafter mentioned) of all that certain real property situate, lying and being in the Counties of Napa and Solano, State of California, more particularly described as follows, to-wit:

Beginning at a point on the boundary line between Solano and Napa Counties, which point is 154.25 chains West of the quarter Section line running North and South through the middle of Section 31, Township 4 North, R. 4

West, M. D. B. & M., and which quarter section line was re-established by E. N. Eager, County Surveyor in February and is 357.25 chains West of the West line of Section 36, in Township 4 North, Range 4 West, M. D. B. & M., thence from said point of beginning, North 14.40 chains to the South bank of the Euichica Creek; thence along same westerly about 125 chains to the County boundary line, at a point about 1.75 chains West of a County boundary post and about 109.17 chains westerly from the point of beginning; thence along the shore line of San Pablo Bay, southeasterly about 120 chains and thence North about 45 [276] chains to the place of beginning, containing 472.46 acres, more or less.

Excepting therefrom property sold to Sears Point Toll Road Co., by deed dated November 19, 1926, and recorded April 1, 1927, in Book 288 of Deeds, page 446, described as follows:

Parcel No. 1: A strip of land of the uniform width of 100 feet extending from the westerly boundary line of the lands now or formerly belonging to the Field and Tule Land Company, which line bears N. 0° 07½′ W. to the line of a mean low water in Sonoma Creek, the southerly boundary of said strip of land being parallel to and 30 feet distant at right angles southerly from the surveyed line for the toll road of Sears Point Toll Road Co., and the northerly boundary of said strip of land being

parallel to and distant 100 feet at right angles northerly from said southerly boundary of the herein described strip of land, the portion of said surveyed line hereinabove referred to being described as follows, to-wit:

Beginning at the point of intersection of the westerly line of said lands now or formerly belonging to Field and Tule Land Company with the said surveyed line of Toll-Road at Engineers Station "C" 337 + 62.64 and running thence N. 57° 12′ 30″ W. 1205.92 feet to Engineer's Station "C" 349 + 68.56; thence along a curve to the left, having a radius of 3000 feet for a distance of 635.23 feet to Engineer's Station "C" 356 + 03.79 which equals Station 356 + 18.87; thence N. 69° 20′ 30″ W. 194.25 feet to Engineers Station 358 + 13.12; thence along a curve to the left having a radius of 2000 feet, for a distance of 92.02 feet to Engineers Station 359 + 05.14; thence N. 71° 58′ 40″ W. 1326.40 feet to Engineers Station 372 + 31.54; thence along a curve to the left having a radius of 2000 feet for a distance of 157.46 feet to Engineers Station 373 + 89; thence N. 76° 29′ 20″ W. 1981.20 feet to Engineers Station 393 + 70.20; thence along a curve to the right having a radius of 2000 feet for a distance of 457.67 feet to Engineers Station 398 + 27.67; thence N. 63° 22′ 40″ W. 1034.44 to Engineers Station 408 + 62.31; thence along a curve to the left having a radius

of 1000 feet for a distance of 471.33 feet to Engineers Station 413 + 33.64; thence S. 89° 37′ W. parallel to the northerly boundary of Solano Co., 8.42 feet to Engineers Station 413 + 82.06, which equals Station 413 + 91.11 from which Station a 6″ x 6″ post on said County boundary bears N. 43° 34′ W. 86.2 feet; thence continuing on said course S. 89° 37′ West parallel to and distant 62 feet at right angles southerly from said northerly boundary line of Solano County to the line of mean low water on the easterly side of Sonoma Creek, the beginning point of said portion of Surveyed line, Station 337 + 62.64 being located and defined as follows, to-wit: [277]

Commencing at the meander corner on the westerly boundary line of fraction Section 6, T. 2 N. R. 4 W. M. D. B. & M., and running thence N. 0° 01′ W. 352.63 feet to Engineers Station 250 + 60.43 on said surveyed line of Toll Road; thence along said surveyed line N. 56° 29′ 10″ W. 127.57 feet to Engineers Station 251 + 88; thence along a curve to the left having a radius of 2000 feet for a distance of 362.06 feet to Engineers Station 255 + 60.06; thence N. 66° 51′ 30″ W. 3097.83 feet to Engineers Station 286 + 47.89; thence along a curve to the right having a radius of 2000 feet for a distance of 270.43 feet to Engineers Station 289 + 18.32; thence N. 59° 06′ 40″ W. 817.35 feet to Engineers Station "C" 297 + 35.67; thence along

a curve to the left having a radius of 2000 feet for a distance of 430.15 feet to Engineers Station "C" 301 + 65.32; thence N. 71° 26′ W. 1527.36 feet to Engineers Station "C" 316 + 93.18; thence along a curve to the right having a radius of 1000 feet for a distance of 365.96 feet to Engineers Station "C" 320 + 59.14; thence N. 50° 28′ W. 336.31 feet to Engineers Station "C" 323 + 95.45; thence along a curve to the left having a radius of 3000 feet, for a distance of 352.99 feet to Engineers Station "C" 327 + 48.44; thence N. 57° 12′ 30″ W. 1014.20 feet to Engineers Station "C" 337 + 62.64 being a point on the easterly line of lands of West End Land Company, and being said point of beginning, said above described strip of land containing 18.20 acres, more or less, situate in and being a part of Swamp and Overflowed Survey No. 569, Solano County, Cal.

Also Excepting Parcel #2. The right or easement to take earth and soil for the construction, maintenance and repair of the Toll-Road to be constructed by the party of the first part, extending along the property described in Parcel 1 above, from that certain parcel of land described as follows, to-wit:

A strip of land of the uniform width of 60 feet extending from the westerly boundary line of land now or formerly belonging to the Field and Tule Land Company, which line bears N.

0° 7½′ W. to the line of mean low water in Sonoma Creek, the southerly boundary line of said strip of land being the northerly boundary of Parcel 1 above described, and the northerly boundary of said strip of land hereby described being parallel to and 60 feet distant at right angles northerly at all points from the above described southerly boundary of said strip of land hereby described, containing 10.92 acres, more or less.

Defendant Pacific Gas and Electric Company is the owner of the right of way and easement for transmission line purposes over [278] the above described lands granted by the right of way deed mentioned in paragraph (a) of this Exhibit A.

Receipt of the within Judgment and receipt of a copy thereof admitted this first day of September, 1939.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney.
By R. B. McMILLAN,
Asst. U. S. Attorney.

[Endorsed]: Filed and Entered Nov. 1, 1939.

[279]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS

To Defendants above-named and to Messrs. McCutchen, Olney, Mannon & Greene, S. H. Spaulding, and Stoney, Rouleau, Stoney & Palmer:

You, and each of you, will please take notice that on Monday, November 13, 1939, the complainant will ask the Court to rule upon its motion to amend findings attached hereto.

Dated: November 9, 1939.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney. [280]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS

Now comes the complainant, and without waiving its objections to all of defendants' proposed findings and conclusions of law, which have been adopted and signed by this Court and filed herein on November 1, 1939, and without waiving its objection to the failure of this Court to adopt all of plaintiff's proposed findings and conclusions of law, moves this Court, pursuant to the provisions of Rule 52 (b) of the Federal Rules of Civil Procedure, to amend its findings filed herein by striking therefrom all parts of Paragraphs 3, 5, 6, 7, 8, and 10, relating to this Court's finding of fact that

the lands involved are not, and were never, physically a part of Mare Island, for the reason that said findings are not supported by and are contrary to the facts, set forth erroneous conclusions of law, and are contrary to the findings of fact of this Court in the case of United States v. O'Donnell, et al.

In lieu thereof complainant moves this Court to adopt the proposed findings of fact of complainant, dealing with complainant's contention that the lands involved were and are physically a part of Mare Island, and included within the Castro grant, to-wit: Paragraphs IV, V, VI, VII, VIII, IX, X, XI and XIX; and complainant respectfully asks that the judgment of this Court, entered on November 1, 1939, be amended accordingly.

Complainant also respectfully requests this Court that it be granted a hearing at the convenience of the Court upon this motion.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney

Service of the within motion by copy admitted this 9th day of Nov. 1939.

HENRY E. MONROE,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for Defendant.
Mary W. Stewart, et al.

[Endorsed]: Filed Nov. 9, 1939. [281]

District Court of the United States, Northern District of California, Southern Division

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 13th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St Sure, District Judge.

[Title of Cause.]

After hearing Miss Esther B. Phillips, Assistant U. S. Attorney, and Mr. Lippman, attorney for defendants, ordered motion to amend findings denied. [282]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the United States of America, appearing by its Attorneys, and hereby gives notice that the complainant above-named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 1, 1939, and from the whole thereof.

Dated: January 29, 1940.

ROBERT H. JACKSON,
Attorney General.

N. M. LITTELL,
Assistant Attorney General.

FRANK J. HENNESSY,
United States Attorney for the Northern District of California.

[Endorsed]: Filed Jan. 29, 1940. [284]

[Title of District Court and Cause.]

ORDER ALLOWING TIME FOR DESIGNATION OF CONTENTS OF RECORD ON APPEAL AND FOR DOCKETING RECORD ON APPEAL.

Good Cause being shown, and upon motion of the United States Attorney for the Northern District of California,

It is Hereby Ordered that the United States of America may have to and including April 27, 1940 within which to file its designation of the proceedings and evidence to be contained in the record on appeal and to docket the record on appeal in the above-entitled case.

Dated: February 23, 1940.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 23, 1940. [285]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF THE ORIGINAL MAPS, PAPERS AND EXHIBITS TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon consideration of the original documents, papers, maps, etc. offered in evidence upon the trial of the above-entitled cause,

It Is Hereby Ordered that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with proper certification, all of said original documents, papers, maps, etc. offered in evidence in the above-entitled cause, including those subsequently stricken out, for use in connection with the appeal of said cause, excepting, however, the judgment roll, and certified copy of appointment of A. L. Rhodes, as Special Assistant Attorney for the United States in the case of Bouldin, et al. v. Phelps, reported in 30 Federal Reports 547.

Dated: April 9, 1940.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed April 9, 1940. [286]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON APPEAL

The complainant above-named, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on November 1, 1939, hereby designates the following parts of the record, proceedings and evidence for inclusion in the record on appeal, in conformance with Rule 75 (a) of the Federal Rules of Civil Procedure:

(1) The Amended Bill of Complaint filed May 21, 1931, and

(2) The "Amendments to Amended Bill of Complaint" filed May 23, 1932.

(3) Answer of Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company and West End Land Company Filed February 14, 1936.

(4) First Amendment to said answer filed May 25, 1937.

(5) Second Amendment to said answer filed June 15, 1937.

(6) Answer of James Irvine filed March 18, 1936.

(7) First amendment to said answer filed May 25, 1937. [287]

(8) Second amendment to said answer filed June 15, 1937.

(9) Order substituting Meta S. Healy as party defendant in place of W. H. Healy, deceased, filed April 20, 1936.

(10) Order of Dismissal with prejudice as to defendants Russ Investment Company, Henry A. Kendall, Joseph Dubeault, Wilfred Dubeault and Charles J. Monahan, filed April 9, 1937.

(11) Order of Dismissal as to defendant Meta S. Healy, filed May 26, 1937.

(12) Stipulation in lieu of Answer filed on behalf of defendant Pacific Gas & Electric Company, filed August 30, 1939.

(13) Reporter's Transcript of the Testimony and Evidence adduced at the trial.

(14) The Opinion of the Trial Court, filed August 24, 1939.

(15) Rulings on certain motions and objections, filed August 24, 1939.

(16) Complainant's objections to Defendants' Proposed Findings of Fact and Conclusions of Law, and Complainant's Proposed Findings of Fact and Conclusions of Law, Filed November 1, 1939.

(17) Order allowing Complainant time to file objections to defendants' proposed findings, filed November 1, 1939.

(18) The Findings of Fact and Conclusions of Law as signed by the Court, filed November 1, 1939.

(19) Judgment for defendants filed November 1, 1939.

(20) Complainant's motion to amend Findings filed November 9, 1939.

(21) Order denying Complainant's motion to amend findings, filed November 13, 1939.

(22) Notice of Appeal filed January 29, 1940.

(23) Order entered February 23, 1940, extending the time within which to file the designation of the record on appeal and to docket the record.

(24) Order transmitting original exhibits to the Clerk of the Circuit Court of Appeals for the Ninth Circuit and to be held by him for use in connection with said appeal. [288]

(25) Original exhibits offered in evidence herein with proper certification thereon by the Clerk of this Court.

(26) This designation of the Record on Appeal.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney
Attorneys for Appellant.

Service of the within designation by copy admitted this 9th day of April, 1940.

McCUTCHEN, OLNEY, MANNON & GREENE
Attorneys for certain defendants.

Service of the within designation by copy admitted this 9th day of April, 1940.

W. H. SPAULDING,
STONEY, ROULEAU, STONEY & PALMER,
Attorneys for James Irvine.

[Endorsed]: Filed Apr. 9, 1940. [289]

[Title of District Court and Cause.]

DESIGNATION BY DEFENDANTS AND APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN THE RECORD ON APPEAL

Defendants and appellees Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, West End Land Company and James Irvine hereby designate the following portions of the record, proceedings, and evidence to be included in the record on appeal in addition to the portions of the record, proceedings and evidence designated by complainant and appellant to be contained in the record on appeal, in conformity to Rule 75(a) of the Federal Rules of Civil Procedure:

(1) Order for transfer of suit to Southern Division of Northern District of California, dated and filed September 8, 1930;

(2) Stipulation for view of premises, filed August 16, 1939. [290]

(3) This designation of additional portion of record to be included in record on appeal.

HENRY E. MONROE
J. M. MANNON, JR.
A. CRAWFORD GREENE
ROBERT L. LIPMAN
Attorneys for defendants and appellees Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, and West End Land Company

W. H. SPAULDING
THOMAS E. PALMER
STONEY, ROLEAU, STONEY & PALMER
Attorneys for defendant and appellee James Irvine

[Endorsed]: Filed Apr. 17, 1940. [291]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 291 pages, numbered from 1 to 291 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the designations for contents of record on appeal in the cause entitled United States of America, vs. Mary W. Stewart,

et al., In Equity Number 2685-S, as the same remain on file and of record in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $78.05; that said amount has been charged against the United States.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 22nd day of April, A. D. 1940.

[Seal] WALTER B. MALING,
Clerk,
By B. E. O'HARA,
Deputy Clerk. [292]

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mary W. Stewart, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 24, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9507

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

STATEMENT OF POINTS RELIED UPON BY APPELLANT ON APPEAL

Comes now the United States of America, the appellant herein, appearing by its attorneys, and pursuant to Rule 19(6) of the Rules of this Court, files the following statement of the points upon which the appellant will rely upon appeal.

1.

The District Court erred in making Findings of Fact and Conclusions of Law and entering judgment against complainant for the reason that said Findings are not supported by and are contrary to the evidence, set forth erroneous conclusions of law, and are contrary to its findings of fact in the case of United States v. O'Donnell, et al., Equity No. 2787-S, and the conclusions of law and judgment are not supported by and are contrary to established law.

2.

The District Court erred in holding in its opinion and order filed August 24, 1939, that complain-

ant take nothing by its suit and [293] that defendants have judgment as prayed for in their several answers for the reason that said opinion and order are not supported by and are contrary to the evidence, set forth erroneous conclusions of law, and are contrary to its findings of fact in the case of United States v. O'Donnell, et al.

3.

The District Court erred in failing to adopt the findings of fact and conclusions of law requested by complainant.

4.

The District Court erred in denying complainant's motion to amend its findings by striking therefrom all parts of paragraphs 3, 5, 6, 7, 8, and 10, relating to its findings of fact that the lands involved are not, and were never, physically a part of Mare Island, said motion having been made upon the grounds that said findings are not supported by and are contrary to the facts, set forth erroneous conclusions of law, and are contrary to its findings of fact in the case of United States v. O'Donnell, et al.

5.

The District Court erred in finding in paragraph 1 of its Findings of Fact that the United States is not the owner of and at no time subsequent to September 28, 1850, ever was the owner of the land described in subdivision II of the amended bill of complaint, and that the defendants, named therein,

are severally the owners of said described lands, since said finding is not supported by and is contrary to the evidence, and states an erroneous conclusion of law.

6.

The District Court erred in finding in paragraph 3 of its Findings of Fact that all of the lands described in subdivision II of [294] the amended bill of complaint were on September 28, 1850, unreserved and unsold public land of the United States, and that all of said lands were then swamp and overflow lands, within the purview and meaning of the Swamp Land Act (9 Stat. 519), and that all of said lands were granted and passed to the State of California under and by virtue of said Act, and that said defendants, named in paragraph 1, are severally the successors in ownership and title to the State of California of said described lands, for the reason that said finding is not supported by and is contrary to the evidence, and states an erroneous conclusion of law.

7.

The District Court erred in finding in its Finding of Fact No. 5 that none of the lands described in subdivision II of the amended bill of complaint was ever a part of Mare Island; that none of said land was, either at the time of said grant to Castro or at the time of any of the proceedings for the confirmation of said grant, a part of the lands known as or referred to as or by the name of Mare Island; that none of said lands was embraced in or covered by the aforesaid grant to said Victor Castro

of Mare Island; that none of said lands was ever occupied by or in possession of said Victor Castro; that none of said lands was in the aforesaid proceedings confirming the said grant made to Victor Castro claimed as a part of or to be a part of Mare Island; that none of said lands was covered by or embraced within the aforesaid confirmation proceedings or the order of confirmation made by said Board of Land Commissioners or said judgment or decree of the United States District Court for the Northern District of California confirming said grant and said order of confirmation of said Board; and that none of said land was purchased or acquired by the complainant in or as a part of its purchase of said Mare Island, for the reason that said Finding is not supported by and is contrary to the evidence and is contrary to its findings of fact in the case of United States v. [295] O'Donnell, et al.

8.

The District Court erred in finding in that part of its Finding of Fact No. 5, that Dutchman's Slough, also known as Boat Cut-off, is and ever since prior to 1841, has been a natural navigable body of water, cutting off all of said lands lying to the east and northeast thereof from all of the remaining lands described in Exhibit A attached to said findings and all of the land lying within said Mare Island Navy Yard Reservation, for the reason that it is not supported by and is contrary to the evidence and sets forth an erroneous conclusion of law.

9.

The District Court erred in finding in its Finding of Fact No. 6 that the survey of Mare Island and the plat thereof, as made and prepared in 1877 by James A. Freeman, United States Deputy Surveyor, was not approved, either expressly or impliedly, by the Surveyor General of California, by the Commissioner of the General Land Office, nor by the Secretary of the Interior, for the reason that it is not supported by and is contrary to the evidence, sets forth an erroneous conclusion of law, and is contrary to its findings of fact in the case of United States v. O'Donnell, et al.

10.

The District Court erred in finding in paragraphs numbered 7 and 8 of its Findings of Fact "that none of the land described in Subdivision II of the amended bill of complaint was included or embraced within the lands so exempted and reserved and none of said land was exempted or reserved from the sale by Executive Order or was subject to reservation at any time subsequent to September 28, 1850", for the reason that said findings are not supported by and are contrary to the evidence, set forth erroneous conclusions of law, and are contrary to [296] its findings in the case of United States v. O'Donnell, et al.

11.

The District Court erred in finding in paragraph 9 of its Findings of Fact "that each of said patents

is in all respects valid and in full force and effect" for the reason that said Finding is not supported by and is contrary to the evidence, and for the further reason that it sets forth an erroneous conclusion of law.

12.

The District Court erred in making its Finding of Fact No. 10 and paragraphs (a), (b), (c), and (d) thereunder, finding in substance that the southeasterly boundary of Survey 569 has been established, recognized, and acquiesced in by the United States as the line beyond which said Mare Island Reservation did not extend, and that at no time since 1890 has the United States asserted or attempted to assert or exercise jurisdiction, dominion or sovereignty over any of the lands within said Survey 569 as a part of said Mare Island Reservation, for the reason that said Finding sets forth erroneous conclusions of law, is irrelevant and immaterial, and is, in part, not supported by and is contrary to the evidence.

13.

The District Court erred in finding in its Finding of Fact No. 11 the several amounts paid by defendants for the purchase, development, and improvement of the lands described in Exhibit "A" attached to said Findings of Fact and Conclusions of Law for the reason that said Finding is based upon incompetent, irrelevant and immaterial evidence, and is foreign to any issue involved in this case;

and said Finding does not constitute a legal defense against the United States. [297]

14.

The District Court erred in holding in paragraph 1 of its Conclusions of Law that this action is barred by the statute of limitations (Sec. 8 of the Act of March 3, 1891 (26 Stat. 1099), Title 43 U. S. C. sec. 1166) as to all lands described in Exhibit "A" attached to said Findings of Fact and Conclusions of Law, embraced in swamp land patents 72 and 152 for the reason that it is not supported by and is contrary to established law.

15.

The District Court erred in holding in paragraph 2 of its Conclusions of Law that the United States is not the owner of or has any right, title or interest in or to the lands or any of the lands described in subdivision II of the amended bill of complaint or in Exhibit "A" attached to said Findings of Fact and Conclusions of Law for the reason that it is not supported by and is contrary to established law.

16.

The District Court further erred in its holding in paragraph 2 of said Conclusions of Law for the reason that it is based upon findings of fact which are not supported by and are contrary to the evidence, namely, the finding that the boundaries and extent of Mare Island, as granted by the Republic

of Mexico to Victor Castro, and as confirmed by the Board of Land Commissioners, did not include the land described in subdivision II of the amended bill of complaint.

17.

The District Court further erred in its holding in paragraph 2 of said Conclusions of Law for the reason that said holding is based in part upon findings of fact dealing with defendant's affirmative de-
[298] fense of equitable estoppel and established public boundary which are not available to the defendants against the United States as a matter of law.

18.

The District Court erred in refusing to adopt complainant's requested Finding of Fact No. 19 that its Findings of Fact in the case of United States v. O'Donnell, et al., that the lands within Survey 34, the neck or isthmus of the land adjoining the land on the high area on the northwest and adjoining the lands involved here on the southwest were and are a part of Mare Island, and as such were included in the area, is also determinative in this case that the lands described in subdivision II of the amended bill of complaint were and are a part of Mare Island, and that its findings in United States v. O'Donnell, et al., relative to the issue as to what lands constitute Mare Island, to-wit, Nos. IVa, VII, VIII, XVI, XX, XXV, XXVII XXX, XXXVI, XXXIX, XLI, XLV,

XLVI, XLVII, and L be accepted and incorporated herein as findings in this case.

19.

The District Court erred in admitting in evidence over complainant's objections the testimony of defendants' witnesses F. E. Knight, Harold Casebolt, and F. W. Rush, offered in support of defendants' affirmative defense of equitable estoppel and established public boundary, for the reason that said testimony was irrelevant, immaterial, incompetent, and could not as a matter of law affect the title of the United States.

20.

The District Court erred in admitting in evidence over complainant's objections the testimony of defendants' witnesses, [299] H. D. Butler, John B. Coleman, Olga D. Sievert, Myford Irvine, George Cross, A. O. Stewart, and W. C. Heyer, offered in support of defendants' affirmative defense of equitable estoppel for the reason that the testimony of said witnesses was irrelevant, immaterial and incompetent and could not as a matter of law affect the title of the United States.

21.

The District Court erred in admitting in evidence over complainant's objections the stipulated fact that the lands involved have been assessed and taxed by the State of California each year since 1882, for the reason that said evidence was irrelevant,

immaterial, and incompetent, and could not as a matter of law affect the title of the United States.

22.

The District Court erred in admitting in evidence over complainant's objections the stipulated fact that since 1890 a number of civil cases have been brought and presented in the courts of the State of California pertaining to the lands involved in this case, for the reason that said evidence was irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

23.

The District Court erred in admitting in evidence over complainant's objections defendants' Exhibit 4, being a copy of Survey No. 569, for the reason that said Exhibit was irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

24.

The District Court erred in admitting in evidence over [300] complainant's objections defendants' Exhibit No. 9, being a certified copy of a map recorded in the Recorder's Office in *Saloma* County on November 10, 1913, for the reason that said Exhibit was irrelevant, immaterial, and incompetent, and could not as a matter of law affect the title of the United States.

25.

The District Court erred in admitting in evidence over complainant's objections the judgment roll in the case of San Francisco Savings Union Bank v. Irwin, 28 Fed. 708, and defendants' Exhibit No. 20, a certified copy of the appointment of Judge Rhodes as Special Assistant United States Attorney in the Irwin case, and defendants' Exhibit No. 21, a letter dated September 20, 1886, from the Acting Attorney General to A. L. Rhodes, and the Court erred in denying the Government's motion to strike said letter of September 20, 1886, for the reason that said exhibits were irrelevant, immaterial, and incompetent, and could not as a matter of law affect the title of the United States.

26.

The District Court erred in admitting over complainant's objections defendants' Exhibits 22, 23, 24 and 25, being copies of franchises for a toll road to defendant Sears Point Toll Road Company, by the County of *Saloma,* for the reason that said exhibits were irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

27.

The District Court erred in admitting over complainant's objection defendants' Exhibit 26, being a certified copy of an order of the Board of Supervisors establishing Reclamation District No. 186,

[301] for the reason that said exhibit was irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

28.

The District Court erred in admitting in evidence over complainant's objections a letter from L. E. Cross dated December 5, 1896, to the Commandant of Mare Island Navy Yard, and the Commandant's reply dated December 11, 1896, and the Court further erred in denying complainant's motion to strike said letters, for the reason that said evidence was irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States, and for the further reason that no foundation was laid, and said letters were hearsay.

29.

The District Court erred in admitting in evidence over complainant's objections defendants' Exhibit 27, being a letter dated October 18, 1912, from the First Assistant Secretary of the Interior to the Secretary of the Navy, defendants' Exhibit 28, being a letter in reply dated February 1, 1913, from the Acting Secretary of the Navy to the Secretary of the Interior, and defendants' Exhibit 29, being a blueprint, R-212, which accompanied the letter dated February 1, 1913, for the reason that said Exhibits were irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

30.

The District Court erred in admitting in evidence over complainant's objections defendants' Exhibit 37, being a letter dated August 17, 1923, entitled "Motion for rehearing", defendants' Exhibit 38, being a letter dated September 19, 1923, addressed to the Surveyor [302] General from the Assistant Commissioner of the General Land Office, and defendants' Exhibit 39, being a circular letter written by the Commissioner of the General Land Office to the various Surveyors General, for the reason that said Exhibits were irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

31.

The District Court erred in admitting in evidence over complainant's objections defendants' Exhibit 45, being a letter from A. O. Stewart stating the amount Mrs. Stewart paid for the land claimed by her, for the reason that said exhibit was irrelevant, immaterial, and incompetent and could not as a matter of law affect the title of the United States.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney.
Attorneys for Appellant.

CLIFFORD E. FIX,
Special Attorney,
Department of Justice,
Washington, D. C.

Receipt of a copy of the within Statement is hereby admitted this 22nd day of April, 1940.

W. H. SPAULDING,
THOMAS E. PALMER,
STONEY, ROULEAU,
STONEY & PALMER,
HENRY E. MONROE,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Appellees.

[Endorsed]: Filed April 24, 1940. Paul P. O'Brien, Clerk. [303]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED IN THE RECORD ON APPEAL

To the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

The Appellant above-named, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on November 1, 1939, hereby designates the following parts of the record, proceedings and evi-

dence for printing in the record on appeal, in conformance with Rule 19(6) of the Rules of this Court.

(1) The Amended Bill of Complaint, filed May 21, 1931, and

(2) The "Amendments to Amended Bill of Complaint", filed May 23, 1932.

(3) Answer of Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company and West End Land Company filed February 14, 1936. Omit description of the various parcels of lands, reciting the following: "Here follows description of various parcels of lands with statement of ownership substantially as they appear in Exhibit 'A' to the Judgment."

(4) First Amendment to said Answer filed May 25, 1937.

(5) Second Amendment to said Answer filed June 15, 1937.

(6) Answer of James Irvine filed March 18, 1936. Omit Description of parcel of land and recite the following: "Here follows description of parcel of land with statement of ownership substantially as it appears in Exhibit 'A' to the Judgment."

(7) First Amendment to said Answer filed May 25, 1937. [304]

(8) Second Amendment to said Answer filed June 15, 1937.

(9) Order substituting Meta S. Healy as party defendant in place of W. H. Healy, deceased, filed April 20, 1936.

(10) Order of Dismissal with prejudice as to defendants Russ Investment Company, Henry A. Kendall, Joseph Dubeault, Wilfred Dubeault and Charles J. Monahan, filed April 9, 1937.

(11) Order of Dismissal as to defendant Meta S. Healy, filed May 26, 1937.

(12) Stipulation in lieu of answer filed on behalf of defendant Pacific Gas & Electric Company, filed August 30, 1939.

(13) Reporter's Transcript of the testimony and evidence adduced at the trial.

(14) The Opinion of the Trial Court, filed August 24, 1939.

(15) Rulings on certain motions and objections, filed August 24, 1939.

(16) Complainant's objections to Defendants' Proposed Findings of Fact and Conclusions of Law, and Complainant's Proposed Findings of Fact and Conclusions of Law, filed November 1, 1939.

(17) Order allowing Complainant time to file objections, to Defendants' Proposed Findings, filed Nov. 1, 1939.

(18) The Findings of Fact and Conclusions of Law as signed by the Court, filed November 1, 1939, omitting from the printed record Ex-

hibit "A" to the Findings and Conclusions, excepting the first line appearing on page 1 of Exhibit "A" reading: "It is the fact and the Court finds that" and thereafter recite the following: (Here follows statement of lands owned by various defendants, including particular description of the lands owned by each, in identical form and content, as appears in Exhibit "A" to the Judgment.)

(19) Judgment for defendants filed November 1, 1939, including Exhibit "A" attached thereto.

(20) Complainant's motion to amend Findings filed November 9, 1939.

(21) Order denying Complainant's motion to Amend Findings, filed November 13, 1939.

(22) Notice of appeal filed January 29, 1940.

(23) Order entered February 23, 1940, extending the time within which to file the designation of the record on appeal and to docket the record. [305]

(24) Order entered April 9, 1940, transmitting original exhibits to the Clerk of the Circuit Court of Appeals for the Ninth Circuit and to be held by him for use in connection with said appeal.

(25) The designation of the record on appeal, directed to the Clerk of the District Court.

(26) The following original exhibits trans-

mitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit pursuant to the order of the District Court entered April 9, 1940:

Exclude from the printing all of Exhibit D-1, being a certified copy of transcript in Case #307 before the Board of Land Commissioners, United States v. Bissell and Aspinwall, except the decree of the Board of Land Commissioners.

Exclude from the printing all of Exhibit D-2, being a record of the same case in the United States District Court, Case #311, except the decree of the District Court.

Include the following:

Exhibit E-1—The Smith report to the Secretary of War and Navy, dated March 31, 1850 (excluding Beechey's map attached thereto which is the same as Complainant's Exhibit K-1).

Exhibit E-2—Reservation withdrawal from entry of President Fillmore, dated November 6, 1850, attached to Smith's report.

Exhibit F-1—Sloat Board Report, dated November 6, 1850.

Exhibit F-2—Plans.

Exhibit G—Presidential reservation of Mare Island with letters attached.

Exhibit H—Deeds to Mare Island, and accompanying records, filed in Sonoma County.

Exhibit K-1—F. W. Beechey map.

Exhibit K-2—Wilkes Map (1844).

Exhibit K-3—Map made by French Naval Office (1844), (excluding title page).

Exhibit K-4—Stuart Map (1849).

Exhibit K-5—Gibbes Map (1851).

Exhibit K-6—General chart of Farallones and entrance to Bay of San Francisco. Ringgold (1852).

Exhibit K-7—Ringgold Sheet #2.

Exhibit L-6—Topographic survey, San Francisco Bay and plane table sheet #22 (1856).

Exhibit L-9—Coast and geodetic survey chart (1859). [306]

Exhibit L-11—Coast and Geodetic Survey of San Pablo Bay (1863).

Exhibit N—Small scale reproduction of Exhibits M-1 to M-6, inclusive.

Exhibit P-1—Sanger Board report (exclude Exhibits P-2-3-4, being 3 maps accompanying Sanger Board report).

Exhibit Q—Survey of Mare Island by James Freeman, and accompanying papers.

Exhibit R—Three plats representing records of automatic tide gauge for November, 1929, February, 1905, and June, 1905.

Exhibit T—Series of profiles and cross sections of Mare Island prepared by Carlson.

Exhibit U—Aerial photograph.

Exhibit V-1—Aerial photograph.

Exhibit V-2—Tracings of shore line of photographic reproductions of two surveys, Cutts and Rogers, 1856 and 1857.

Exhibit W—Map entitled "Central California in 1848."

Exhibit X—Certified copy Mexican land grants in California prepared by State Surveyor General of California, Bancroft library.

Exhibit Y—Coast and Geodetic survey records showing description of triangulation section, Sonoma Pole.

Exhibit Z—Copy of official log of Mare Island dated April 15, 1873.

(27) This designation of parts of record to be printed in the record on appeal.

(28) Statement of the points to be relied on by appellant on the appeal.

(29) Stipulation and order relating to the consideration by the Circuit Court of Appeals of original exhibits omitted from the printed record.

(30) Designation by defendants and appellees of additional portions of record to be included in the record on appeal.

(31) Order for transfer of suit to Southern Division of the Northern District of California, dated and filed September 8, 1930. [307]

(32) Stipulation for view of premises filed August 16, 1939.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Appellant.

CLIFFORD E. FIX,
Special Attorney,
Department of Justice,
Washington, D. C.

[Endorsed]: Filed Apr. 24, 1940. Paul P. O'Brien, Clerk. [308]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR CONSIDERATION OF ORIGINAL EXHIBITS, DOCUMENTS, PAPERS, MAPS, ETC. OMITTED FROM THE PRINTED RECORD.

It is hereby stipulated and agreed by and between Appellant and Appellees that all of the original documents, papers, maps, etc. offered in evidence upon the trial of the above-entitled case and ordered to be transmitted to the Clerk of the above-entitled Court by order of the District Court, dated April 9, 1940, be considered by the above-entitled Court as a part of the record on appeal; and that those original documents, papers, maps, etc. not designated for inclusion in the printed transcript

of record be used and considered by the above-entitled Court upon this appeal with the same force and effect as though the same had been printed and made a part of the printed transcript of the record, and [309] that upon the termination of this appeal all of said original documents, papers, maps, etc. be returned to the Clerk of the District Court from which this appeal is taken.

Dated: April 24, 1940.

FRANK J. HENNESSY,
United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States Attorney
(Attorneys for Appellant).

HENRY E. MONROE,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
McCUTCHEN, OLNEY,
MANNON & GREENE,
W. H. SPAULDING,
THOMAS E. PALMER,
STONEY, ROULEAU,
STONEY & PALMER,
Attorneys for Appellees.

ORDER

On reading the above stipulation and good cause appearing therefor, it is hereby ordered that the foregoing stipulation be and is hereby approved,

and that all of said original documents, papers, maps, etc., ordered to be transmitted to the Clerk of this Court in the above-entitled cause, whether said exhibits appear in the printed transcript of record on appeal or not, shall be used and considered by this court upon said appeal, notwithstanding the provision of Rule 19 of the rules of this court, with the same force and effect as though the same were incorporated in and made a part of the printed transcript of record.

Dated: April 24, 1940.

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed April 24, 1940. Paul P. O'Brien, Clerk. [310]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED IN THE TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellees Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, West End Land Company and James Irvine hereby designate the following portions of the record, proceedings and evidence for printing in the transcript

of record on appeal, in addition to the portions of the record, proceedings and evidence designated by the appellant to be printed in the transcript of record on appeal, in conformity to Rule 19 of the rules of said Court:

I.

Original documents, maps, papers, etc. offered in evidence upon the trial of the above entitled cause and order transmitted to the Clerk of the United States Circuit Court of [311] Appeals for the Ninth Circuit by order of the District Court dated April 9, 1940, with certification by the Clerk of the District Court, as follows:

Complainant's Exhibit L-1. Chart of Mare Island Straits by Williams and Blunt, 1849.

Complainant's Exhibit L-2. Cutts' Map of Mare Island, 1851, Registry No. 316.

Complainant's Exhibit L-5. Coast survey map of Mare Island, 1851.

Complainant's Exhibit L-8. Coast survey map of Mare Island Straits by Alden, Registry No. 544.

Complainant's Exhibit L-10. Coast survey map of Petaluma and Napa Creeks, 1861.

Complainant's Exhibit L-14. Topographical re-survey by Lawson and Walker, 1886, No. 1825.

Complainant's Exhibit L-15. Coast and geodetic survey from plate 3197, Edition of 1915, No. 5533.

Complainant's Exhibit S-1. Contour map by Rousseau, 1906.

Complainant's Exhibit S-2. Contour map by Carlson, 1917.

Defendants' Exhibit 1. California Geological Survey map, 1873.

Defendants' Exhibit 2. Mare Island quadrangle map.

Defendants' Exhibit 3. Napa quadrangle map.

Defendants' Exhibit 4. Certified copy of Swamp Land Survey 569.

Defendants' Exhibit 5. Certified copy of state patent to Pearson in 1874.

Defendants' Exhibit 6. Swamp Land Patent 72.

Defendants' Exhibit 7. Swamp Land Patent 152.

Defendants' Exhibit 8. Patent No. 937055.

Defendants' Exhibit 9. Certified copy of map of Mare Island Navy Yard Reservation recorded by Commandant on November 10, 1913. [312]

Defendants' Exhibit 10. Photostatic reproduction of Map by J. H. Coulton & Co., 1855.

Defendants' Exhibit 11. Map of gold region of California by Ellis, 1850.

Defendants' Exhibit 12. Photostatic reproduction of portion of Map of United States by the General Land Office, 1866, showing military reservations.

Defendants' Exhibit 13. Map of gold and quicksilver regions by Lieut. E. O. C. Ord, 1848.

Defendants' Exhibit 14. Reproduction of portion of Official Map of Solano County, 1890.

Defendants' Exhibit 15. Reproduction of portion of Official Map of Solano County, 1909.

Defendants' Exhibit 16. Reproduction of portion of Official Map of Solano County, 1925.

Defendants' Exhibit 17. Photostatic reproduction of the Hilgard chart of 1884.

Defendants' Exhibit 20. Copy of appointment of Judge Rhodes as special assistant attorney for the United States in San Francisco Savings Union v. Irwin.

Defendants' Exhibit 21. Copy of letter from Acting Attorney General to Rhodes directing him to sue out writ of error in the Irwin case.

Defendants' Exhibit 22. Sears Point toll road franchise, dated March 1, 1926.

Defendants' Exhibit 23. Sears Point toll road franchise, dated April 4, 1927.

Defendants' Exhibit 24. Sears Point toll road franchise, dated June 4, 1928.

Defendants' Exhibit 25. Sears Point toll road franchise, dated July 2, 1928.

Defendants' Exhibit 26. Certified copy of order creating Reclamation District 186.

Defendants' Exhibit 27. Certified copy of letter from Secretary of the Navy to Assistant Secretary of Interior dated October 18, 1912.

Defendants' Exhibit 28. Certified copy of letter from Acting Secretary of Navy to Secretary of the Interior dated February 1, 1913.

[313]

Defendants' Exhibit 29. Certified copy of blue print No. R-212.

Defendants' Exhibit 30. Letter dated July 25, 1879, from Acting Commissioner to Wagner.

Defendants' Exhibit 31. Letter of August 7, 1897, from Acting Commissioner to Wagner.

Defendants' Exhibit 32. Certified copy of Wagner's letter of August 7, 1879, to the Commissioner returning the Freeman Survey.

Defendants' Exhibit 33. Hanley protest of July 5, 1879, to the Surveyor General.

Defendants' Exhibit 34. Hanley protest of July 16, 1879, to the Commissioner.

Defendants' Exhibit 35. Copy of excerpts from Surveyor General's report of August 22, 1878, showing death of Ames, etc.

Defendants' Exhibit 36. Certified copy of letter of February 28, 1921, to the Surveyor General from the Acting Commissioner.

Defendants' Exhibit 37. Certified copy of letter of August 17, 1923—Decision 28814.

Defendants' Exhibit 38. Certified copy of letter of September 19, 1923, to the Surveyor General directing closure of survey.

Defendants' Exhibit 39. Certified copy of circular by Commissioner with regard to return of township plats.

Defendants' Exhibit 40. Correspondence between the Attorney General and the Governor of California prior to the Cession Act of 1854.

Defendants' Exhibit 41. Plat of Township 3 North, Range 5 West.

Defendants' Exhibit 42. Plat of Township 4 North, Range 5 West.

Defendants' Exhibit 43. Plat of Township 3 North, Range 4 West.

Defendants' Exhibit 44. Plat of Township 4 North, Range 4 West.

Defendants' Exhibit 45. Letter of June 15, 1937, from A. O. Stewart to Judge Olney.

Certified copy of judgment roll in San Francisco Savings Union v. Irwin, No. 3140. [314]

II.

This designation of additional portions of the record to be printed in the transcript of record on appeal.

HENRY E. MONROE,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for defendants and appellees Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, and West End Land Company.

W. H. SPAULDING,
THOMAS E. PALMER,
STONEY, ROULEAU,
STONEY & PALMER,
Attorneys for defendant
and appellee James Irvine.

[315]

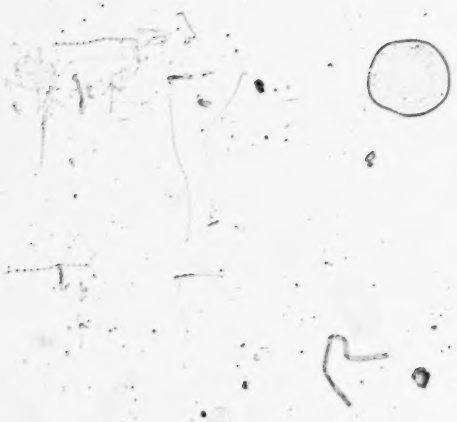
Service of the within designation and receipt of a copy thereof admitted this 26th day of April, 1940.

FRANK J. HENNESSY,
United States Attorney.

.....

Asst. United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed April 26, 1940. Paul P. O'Brien, Clerk. [316]



Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

TRANSCRIPT OF RECORD

In Five Volumes

Supreme Court of the United States

October Term, 1941

No. 848

MARY W. STEWART, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

VOLUME II

(Pages 355 to 722)

Testimony

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO.

No. 9507

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Transcript of Record

In 4 Volumes

VOLUME II

(Pages 355 to 722)

Testimony

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 70-2-2-49

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, in and for the Northern District of California

Before: Hon. A. F. St. Sure, Judge.

No. 2685-S

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. O. STEWART, et al.,

Defendants.

TESTIMONY

Tuesday, June 8, 1937.

The Court: As there are a number of defendants in this case, I will ask the Clerk to call the roll of them, so that we may ascertain who is represented here and who is not, and by whom each defendant is represented.

The Clerk: United States of America is represented by Miss Esther B. Phillips.

Miss Phillips: By Miss Esther B. Phillips, H. H. McPike, United States Attorney, and Philip Buettner, Assistant in the Office of Judge Advocate General, Navy Department.

The Clerk: Defendant J. C. Aitken, sued as Fifth Doe.

The Court: Apparently nobody is representing Mr. Aitken.

Miss Phillips: Your Honor, at the conclusion of the case, in so far as any defendant has neither

answered nor has been represented nor has appeared, I propose to ask for a default as to that defendant; until that time has arrived, however, I prefer to leave the matter open.

The Court: Very well.

The Clerk: American Securities Company, a corporation.

The Court: The paper I have before me shows Henry E. Monroe, [1*] Warren Olney, Jr., J. M. Mannon, Jr., A. Crawford Greene.

Mr. Lipman: I think a disclaimer was filed as to that company. I have not my pleadings here, but I am very sure that a disclaimer was filed as to that company.

The Court: Very well.

The Clerk: American Trust Company, a corporation.

Mr. Lipman: We are representing the American Trust Company, your Honor, the attorneys you have just named, and Warren Olney, III.

The Clerk: The record shows Henry E. Monroe, Warren Olney, Jr., J. M. Mannon, Jr., A. Crawford Greene.

Mr. Lipman: And Robert L. Lipman and Warren Olney, III.

The Court: Very well.

The Clerk: Bay Land Company, a corporation.

Mr. Lipman: The same as to that company.

The Court: The record shows Halsey L. Rixford, Henry E. Monroe, W. F. Williamson, Wallace & Vaughn.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

Mr. Lipman: We represent them, your Honor. We filed an answer on behalf of all these defendants, and as I understand it we are the counsel appearing for them; that is to say, Henry E. Monroe, Warren Olney, Jr., J. M. Mannon, Jr., A. Crawford Greene, Robert L. Lipman, and Warren Olney, III.

The Clerk: Ida M. Brickell. The record shows the appearance of George F. Snyder. There is no appearance this morning. Howard Brickell, deceased?

The Court: This list that I have shows Chickering & Gregory.

The Clerk: That is correct, your Honor. There is no appearance. The next is John D. Brickell, Deceased—Heirs and Distributees of John D. Brickell, Deceased. No appearance. Louise De Voe Brickell: No appearance.

Edmund Burke, charged as Tenth Doe: No appearance.

Walter E. Burke, Administrator of Estate of Edmund Burke, [2] Deceased: No appearance.

California Pacific Realty Co., a corporation.

Mr. Lipman: I believe a disclaimer was filed as to them.

The Clerk: California Pacific Title and Trust Company, a corporation.

Mr. Lipman: The same is true as to that company.

The Court: A disclaimer?

Mr. Lipman: Yes, your Honor, a disclaimer was filed.

The Clerk: H. V. Casebolt: No appearance.

James Clayton, charged as Second Doe: No appearance.

Crocker First Federal Trust Company, Trustee of the Brickell Estate: No appearance.

H. W. Davis, charged as Seventh Doe: No appearance.

Joseph Dubeault: A dismissal has been filed. The same as to Wilfrid Dubeault, a dismissal has been filed.

Field and Tule Land Company, a corporation.

Mr. Lipman: We represent that company.

The Court: And also Mr. Monroe?

Mr. Lipman: Yes, your Honor.

The Clerk: Meta S. Healy.

Miss Phillips: A dismissal has been filed as to her.

The Clerk: And also W. H. Healy, a dismissal has been filed?

Miss Phillips: Yes.

The Clerk: C. D. Hillman, charged as First Doe: No appearance.

James Irvine:

Mr. Palmer: The defendant is represented by W. H. Spaulding and by Stoney, Rouleau, Stoney & Palmer.

The Court: I also see the name here, Guy C. Earl.

Mr. Olney: Mr. Guy C. Earl has passed away.

The Court: Yes. [3]

The Clerk: Henry A. Kendal: A dismissal has been filed.

Miss Phillips: Yes, a dismissal has been filed.

The Clerk: Henry Claude Kettleman.

Miss Phillips: The same as to Kettleman.

The Clerk: Frank E. Knight.

Mr. Lipman: A disclaimer has been filed.

The Clerk: Charles J. Monahan.

Miss Phillips: A dismissal has been filed as to that defendant.

The Clerk: Pacific Gas & Electric Company, a corporation: No appearance.

Russ Investment Company, a corporation.

Miss Phillips: A dismissal has been filed.

The Clerk: Sears Point Toll-Road Co., a corporation.

Mr. Lipman: We represent that defendant.

The Clerk: A. O. Stewart.

Mr. Lipman: A disclaimer has been filed.

The Clerk: Mary W. Stewart.

Mr. Lipman: We represent Mary W. Stewart.

The Clerk: West End Land Company.

Mr. Lipman: We represent that company.

The Clerk: E. G. Swanberg: No appearance.

The Court: Now you may proceed with the case.

OPENING STATEMENT FOR THE PLAINTIFF

Miss Phillips: This is an action to quiet title brought by the United States against these defendants who are in possession of land situate in California which the United States claims to be a part of Mare Island. The United States deraigned its title from two sources; one, a Mexican Grant, con-

firmed by the California Land Commission, and thereafter confirmed by [4] the United States District Court. Secondly, a valid presidential reservation for military purposes.

The defendants deraigned their title from the Swamp and Overflow Act of September, 1850. They claim they are grantees of the State of California, which, in turn, they claim to be a grantee of the United States.

Your Honor is familiar with many of the issues of law presented in this case. Many of them were considered and passed upon by your Honor about three and one-half years ago, in the case of United States v. O'Donnell. Many of the questions of fact are the same. The chief question of fact from plaintiff's standpoint is the question, What is Mare Island? I do not mean to say that all the issues of law and all of the issues of fact presented in the O'Donnell Case are present here, but many of them are. I shall not elaborate on the details of the plaintiff's case. I prefer to let the witnesses and the many exhibits which will be offered in the shape of maps and written records speak for themselves.

OPENING STATEMENT FOR DEFENDANTS

Mr. Lipman: May it please the Court: I think it will be of assistance to the Court and facilitate an understanding of our evidence, and also of our objections to some of the evidence which will be offered by the Government if I state briefly the position of the defendants.

Your Honor has already had a roll call of the defendants. I wish to say that it has been agreed between Mr. Palmer and ourselves that to avoid confusion we will present the defence on behalf of Mr. James Irvine, as well as on behalf of the clients we represent of record. So it will be understood that all objections made and exceptions taken, and all statements and stipulations which we make are to be deemed to be made on behalf [5] of Mr. Irvine as well as our own clients. I believe there is no objection to that, Miss Phillips?

Miss Phillips: There will be no objection to that; I believe it will expedite the trial.

Mr. Lipman: Coming then to the case before us, if the Court please, the Bill of Complaint seeks to cancel three swamp land patents granted by the Federal Government, and to quiet title to lands which are in the possession of these defendants. The claim of the Government is, as counsel has just stated, that these lands are a part of Mare Island, and as such are owned by the Government. The lands in question are that portion of Swamp Land Survey No. 569, which are embraced—I will get a map to illustrate this. Purely for the purpose of illustration, we wish to indicate that the lands involved in this suit are those lands which are shown on what is known as the Mare Island Quadrangle Map, as Island No. 1, and those portions of Swamp Land Survey that are shown on that. It is the claim of the defendants that none of these lands were ever a part of whatever was or

is known as Mare Island; that these lands were granted to the State of California under the Swamp Land Act, and that the ownership of them is now vested in the defendants severally, each owning that portion set up in the Answers.

We think it is important that the Court should understand at the outset that while, as counsel has said, many of the issues in this case are similar to the issues which were in the O'Donnell case, this case differs in one evry essential particular from the O'Donnell case. This difference we expect to show is of controlling importance. The facts in this connection are set up specifically in the amendments to the answers. The difference is this: that the lands in this suit have been in the [6] private occupation and possession of the defendants and their predecessors in interest for much in excess of thirty years prior to the commencement of this action. We propose to show that this possession has been open and notorious and continuous ever since a few years following the final decision of the Supreme Court of the United States in the Irwin case, in 1890; that the possession and use of the property has been undisturbed; that the State of California and its political subdivisions have exercised jurisdiction over these lands by way of taxation; that the State Courts have taken jurisdiction of suits pertaining to these lands; that franchises for a toll road have been granted across these lands; that power lines have been erected across them; that they have been treated as in reclamation districts

and in mosquito abatement districts, and in fact have been included in private lands in the State of California, and, as I say, openly and notoriously to such an extent as to be manifestly known to the Federal Government.

We expect to show that while the Federal Government has occupied Mare Island during all these years, and has used portions of the land to the south of the present Navy Yard fence which is the south line of Survey 569, it has not used or occupied any of the lands in this suit, nor has it interfered with the occupation and possession of the defendants and their predecessors in interest; in fact, since the decision in the Irwin Case in 1890, we expect to show that no claim has ever been made to the lands prior to the bringing of this action, which was in 1930. We expect to show in this connection that under the repeated decisions of the United States Supreme Court the Government's long acquiescence all these years in the present fence line as the uttermost northwesterly boundary line of the Navy Yard reservation is absolutely conclusive against the Government's claim to [7] these lands, even if it could be shown that as an original matter that line was not in the correct place. The purport of those decisions is that where a boundary line between two different sovereignties has been acquiesced in for a long number of years that line is conclusively taken to be the boundary line, irrespective of what is shown as to the proper location as an original matter. And it

is in this particular, as I have said, that this case differs materially from the O'Donnell Case, in which, as the Court knows, the defendants had not been in possession of the lands which were sued for by the Government. We propose to show that this difference goes not only as to the law of the case, but it goes to the essential equities of the case. We shall show that there is no equity, whatever, in the Government's present claim, and that this want of equity appears right on the face of the Bill.

We further expect to show that this case, as to some of the lands, differs in yet another important particular from the O'Donnell Case. In Subdivision 12 of the Amended Bill it is alleged that Swamp Land Patent No. 72 was issued to the State of California on June 5, 1896, which was thirty-four years before this action was brought. That patent includes the land involved in this suit lying in Township 3 North Range 5 West. The same section of the Bill alleges that Swamp Land Patent No. 152 was issued on February 7, 1910, which was over twenty years before the bringing of this suit. That patent embraces the lands lying within Township 4 North Range 5 West. Those two patents together include all of the land embraced in this suit lying in Range 5 West Mount Diablo Base and Meridian. These allegations of the Amended Bill are admitted by the Answers. It thus affirmatively appears that the six years statute of limitations on setting aside a patent has run many times over as to all [8] of these lands. This defense is set up in

our answer. I want to ask counsel for the Government if the Government now claims that the statute of limitations has not run as to the two patents I have mentioned, and as to the lands in Range 5 West.

Miss Phillips: I certainly claim that the statute of limitations has not run. Our position on that is strictly one of law, your Honor. I am not claiming as to dates, what date a patent was issued and what date the suit was filed. That is too simple a matter to be in controversy. The point that the Land Office may give a patent not within its jurisdiction and that the patent may thereafter be set aside by the United States in a suit brought for that purpose has been too many times passed upon, and is too conclusively settled under the authorities to be even arguable. I think all this is a matter of briefing, your Honor.

Mr. Lipman: I just wanted to know the position of counsel. It is our contention that under the well-settled authorities that after the six years run the patent cannot be set aside, whether it is granted rightly or wrongly. Merely for the purpose of identification I would say that the lands in Range 5 West are the lands of the defendant West End Land Company, Bay Land Company, and Field and Tule Land Company.

As to other issues in the case, may it please the Court, our position is this: The Government has stated that its source of title depends upon two things, one the supposed Castro Grant, and, second, reservations by the President.

As to the Castro Grant, the position of the defendants is that there is no proof that any such grant was ever made, and that the Government, itself, in the Bouldin Case, proved that that grant was fraudulent and void. As to any competent proof, aside from the alleged confirmation proceedings, it is our position that the evidence is wholly wanting. As to the confirmation [9] proceedings, themselves, our position is this, that even if the confirmation had been valid it did not affect the lands in suit, and that in any event it affirmatively appears as matter of law that inasmuch as the United States Government purchased the claims of the claimants prior to proceedings had on the petition for confirmation, there never was any real adjudication in the Land Commission proceedings, or in the District Court, and that those proceedings at least as to these defendants are null and void and of no binding effect.

I think that your Honor may be familiar with the authorities as developed in the Answer to the Petition for Rehearing in the O'Donell Case, and I need not enlarge upon our views——

The Court: No, I have not read it.

Mr. Lipman: Our position is simply this, that under the decisions of the United States Supreme Court, when one party becomes the owner or in control of both sides of a litigation anything further that is done in the litigation is absolutely null and void, as some of the cases say, but in any event it is not binding upon any parties except the imme-

diate parties, and perhaps those who purchase from the immediate parties subsequent to the proceedings. In this case, California's grant under the Swamp Land Act is before the alleged proceedings and therefore the proceedings cannot be binding upon California or its predecessors in interest. Furthermore, under this statute confirmation proceedings are essentially a representative proceeding in which the United States is the party to orepresent all interests other than those and opposed to those of the claimants. Under all of the authorities, where a representative purchases an interest in the litigation, that is hostile to the interests of those whom he is to represent, the representation ceases, and any decree that thereafter is made in the proceedings [10] is not binding upon those who would otherwise have been represented. For those reasons it is our claim that the confirmation proceedings are not and cannot be binding upon these defendants. But, as I have said, even if the Castro Grant were valid, we expect to show that it cannot affect these defendants, for the lands in suit were not within the grant. We expect to show that the overwhelming weight of the evidence will be that none of these lands were ever known as a part of Mare Island. The Government's own evidence will show the name "Mare Island" has always been used to designate only the high land to the southeast of the southeasterly line of Survey No. 34. In this connection we expect to show that under the Mexican Law the shore of the sea which was not subject to private

ownership extended to the highest high water mark, which in that respect is different from the common law, which goes to the mean high water line. We expect to show by evidence that the thin neck of land which comprised a portion of Survey No. 34 to the north of the high land of Mare Island was under water at least twice every month at the higher tides, and that it was probably under water at the time of ordinary high tide when there was a stiff wind from the southwest. We, therefore, claim that what was granted by the Mexican authorities must, of course, be determined in the light of their law, because it was in the light of that law that the grant was made, and that, therefore, the Castro line in any event only goes to the highest tide water, and that would exclude all the lands from the grant.

The Bill shows that the Government intends to place heavy reliance upon the Freeman survey. As to that the position of the defendants is, first, that the evidence shows without any conflict whatever that that survey was never approved, either as provided by the statute or otherwise, or has ever been [11] relied upon or acted upon by the Government as the official survey, and it has no official standing whatever. In the second place, we expect to show that the survey under the statute is but a part of the confirmation proceedings, themselves, and is affected by the same infirmities as in here in these confirmation proceedings, and that therefore the Freeman Survey can have no place in this litigation.

With regard to Presidential reservations on Mare Island in 1850 and 1853, the position of the defendants is that neither of those reservations even attempted to reserve any of the lands here in suit. Our second point is that even if they did it is perfectly evident that a Presidential Reservation cannot set aside a prior congressional grant of lands to the State of California, and that, therefore, we are not affected by either of those reservations.

There are a number of other points involved in the case but I do not believe they call for any mention at this time. I have tried to give your Honor the position of the defendants on these points. In closing I will merely restate that the third defense set up in the amendments to the answers, that this boundary line which has been acquiesced in for all these years is, in our judgment, absolutely conclusive, irrespective of how the other issues in the case may be decided.

Miss Phillips: Before calling witnesses, your Honor, I would like to state that the questions of law which counsel says are without conflict, I expect to show, in briefs or in argument, are highly in conflict, and are decided adversely to his position. I do not think this is the time or place right now to get into an argument, or to cite authorities, which would involve bringing a library here into the court-room. I would like the record to show that upon the points of law which counsel has stated to [12] your Honor the Government's position in most of the matters is completely the opposite to that

stated by counsel; that is to say, we say that as to many of the points which counsel says are settled in his favor they are settled in our favor. That means that the matter had better be briefed at the conclusion of the case.

FRANK E. BARKER,

Called for the United States; Sworn.

Miss Phillips: Q. Mr. Barker, you are an engineer and draftsman in the United States Public Survey Office? A. Yes.

Q. When did you join the United States Public Survey Office? A. 1909.

Q. Where are you now stationed?

A. Glendale, California.

Q. How long has this office been located in Glendale, California?

A. Since 1932.

Q. Prior to 1932 where was it located?

A. San Francisco.

Q. Was the former name of this office the U. S. Surveyor General for California? A. Yes.

Q. At about what date was the name changed?

A. 1925.

Q. Mr. Barker, has this office custody of the archives of the Mexican Government in California?

A. Yes.

Q. Has this office custody of the records and files of the land Commission of California?

A. Yes.

(Testimony of Frank E. Barker.)

Q. Has this office an original inventory of the documents received by the United States Surveyor General of California from the California Land Commission? A. Yes.

Q. Have you it there with you? A. Yes.

Miss Phillips: Your Honor, I wish to show this to defendants' counsel before questioning the witness about it.

Q. Mr. Barker, I show you the concluding paragraph of this inven- [13] tory and ask you if you recognize the signature of John C. Hayes, Surveyor General? A. Yes.

Q. You have seen that signature on many official papers and records, have you? A. Yes.

Miss Phillips: Your Honor, I would like to read into the record the title of this inventory, which reads as follows: "List of the Papers, Documents and Books turned over to and deposited with the U. S. Surveyor General of California by the late Board of Commissioners to ascertain and settle the private land claims in said State," and the conclusion of the inventory, which reads: "Received, San Francisco, March 19, 1856, Alpheus Felch, R. Aug. Thomson, and S. B. Farwell, the Commissioners appointed under the Act of Congress entitled 'An Act to Ascertain and Settle the Private Land Claims in the State of California, Approved March 1, 1851,' and the Papers, Documents and Maps and Books belonging to the archives of said Board as enumerated in the forego-

(Testimony of Frank E. Barker.)

ing list. U. S. Surveyor General's Office, San Francisco, California," and signed "John C. Hayes, Surveyor General."

This is an original record, your Honor, and I am going to ask leave to file as an exhibit in the case a photograph of the title page and a photograph of the concluding receipt.

Mr. Lipman: No objection.

Miss Phillips: I would like to direct the Court's attention to the charred and burned condition of many of the leaves. I would like to have the record show the physical condition of the inventory; there are pages charred and burned throughout.

The Court: Yes.

Miss Phillips: May the record show the accuracy of my statement?

The Court: The book appears to have been rebound, is that [14] so?

A. I don't know when it was, myself.

Q. I say it has been rebound, has it?

A. Well it would appear so, but I do not know when.

Q. The first page there to which your attention was called by Miss Phillips shows it was charred as if it had been in a fire. Do you know anything about that?

Miss Phillips: I will have the next witness testify to that.

The Court: Very well.

(Testimony of Frank E. Barker.)

Miss Phillips: The binder on the first page appears different in color and different in texture than the book, itself.

I now wish, your Honor, to direct counsel's attention to and I wish to offer in evidence as a part of the exhibit a page approximately in the middle of the book, entitled "No. 307," which purports to be an enumeration of the documents received in case No. 307. This is a page in the inventory, itself. I ask leave of Court, as with the other two pages, to file a photostat copy in place of that.

I now offer in evidence as Exhibit A a three-page photostatic copy of the original inventory, the first page being the title of the inventory, the second page of this exhibit will be the page relating to Case No. 307, and the third page of the exhibit will be the receipt of the Surveyor General, Hayes.

Mr. Lipman: No objection.

(The documents were marked "U. S. Exhibit A.") (Omitted by designation, from this printed Transcript of Record.)

The Court: Have you copies of the photostats for counsel?

Miss Phillips: I may have. If I have an extra one I will let them have it. It was prepared very hastily, because the witness just arrived from Glendale a day or so ago.

Q. Mr. Barker, directing your attention now to the second page of Exhibit A, which purports to be an inventory of the documents received in

(Testimony of Frank E. Barker.)

Case No. 307 by Surveyor General Hayes in 1856, [15] and having the exhibit in your hand, will you state whether you have made a search of the archives in the Public Survey Office with which you are connected for the papers and various documents listed in Case No. 307? A. I have.

Q. Did you find any of them? A. No.

Q. Mr. Barker, in your testimony you have already stated that your office is the custodian of the Mexican Archives in California. Have you made a search of those archives that are now in your office for the incomplete expediente covering Mare Island? A. Yes.

Q. Did you find one? A. Yes.

Q. Have you it with you? A. Yes.

Q. This is the original you are now handing me? A. Yes.

Miss Phillips: Your Honor, may I now direct the attention of the Court to the charred, burned and torn condition of the original document which the witness has just handed me, and to its brittle condition. It consists of two pages, one page of which is written on both sides.

The Court: You produced this charred document at the O'Donnell trial, did you not?

A. Yes.

Miss Phillips: Obviously, your Honor, the exhibit could not be filed in the court records with any great degree of safety; it is so brittle that it cannot be handled. I ask leave of Court to file, and I

(Testimony of Frank E. Barker.)

now offer in evidence as an exhibit of the Government next in order, Exhibit B, a photostatic copy of the incomplete original expediente which the witness just identified. This exhibit will consist of three pages. Might I ask the witness to assist me in this? Can you say which page has been written on both sides?

A. I believe that is the first page.

Q. The first page, that is what I understood, but I wanted to be sure. The photostatic copies of the first two pages will be a [16] representation of the two sides of the page 1 of the original document, and the third page of the photostat will represent the second page of the document.

Mr. Lipman: I have no objection whatever to a photostat being offered in evidence, other than the original, but I do object to the original on the ground that it does not affect any of the lands in this suit.

The Court: Of course, I cannot tell that at this time.

Mr. Lipman: I wish to make that objection.

The Court: I will overrule the objection and note an exception.

Miss Phillips: I would also direct your Honor's attention to the fact that on the first page of the exhibit which I am offering as a photostat of the original, the writing from the reverse side of the original shows through, and the same appears upon

(Testimony of Frank E. Barker.)

the original document. May the record also show that the original document is in fact discolored, broken, parts of it illegible, because it is charred and partly torn.

The Court: I think that the statement you make is correct.

Miss Phillips: I would ask that this document be marked Government's Exhibit B.

(The document was marked U. S. Exhibit B.)

(Omitted, by designation, from this printed Transcript of Record.)

That is all. You may cross-examine.

Mr. Lipman: No cross-examination.

MISS IVA FRANCES BAILEY,

Called for the United States; Sworn.

Miss Phillips: Q. What is your occupation, Miss Bailey?

A. I was a clerk in the United States Surveyor General's Office.

Q. Whereabouts?

A. In San Francisco, and afterwards in Glendale. [17]

Q. When did you join the staff of the U. S. Surveyor General? A. In January, 1894.

Q. How long were you in the staff of the U. S. Surveyor General's Office?

A. I was there until October, 1932.

Q. When you retired?

(Testimony of Iva Frances Bailey.)

A. When I retired.

Q. Miss Bailey, were you on the staff of the U. S. Surveyor General of California on April 18, 1906? A. I was.

Q. And whereabouts was the U. S. Surveyor General's Office located on that date?

A. At 610 Commercial Street, in the old Sub-Treasury Building, on the third and fourth floors.

Q. What happened to the building on April 18, 1906? It was totally destroyed by fire.

Q. Miss Bailey, were the archives of the California Land Commission, as testified to by the previous witness, in the possession and custody of the U. S. Surveyor General of California on April 18, 1906? A. They were.

Q. In what part of the office were they located?

A. They were in a long room on the third floor on the north side of the light well.

Q. Was it any part of your duty to familiarize yourself with those records? A. Yes, it was.

Q. Did you have occasion frequently to be in that room? A. Very frequently.

Q. Was it customary for members of the public to come to your office while you were there?

A. A great many times.

Q. Was it frequent or infrequent that members of the public asked for copies of the records which were part of the California Land Commission records?

A. There were a great many requests prior to the fire.

(Testimony of Iva Frances Bailey.)

Q. And was it any part of your duty to supply such copies?

A. Sometimes I made them, but I did not in all instances. [18]

Q. Was it any part of your duty to withdraw records from the office in order to have copies made? A. No.

Q. I do not mean to take them out of the building, I mean to hand them the records?

A. Yes.

Q. Was there a space in that room on the third floor where the archives of the Land Commission were located? A. Yes.

Q. Whereabouts were the archives of the Mexican Government in California kept in the U. S. Surveyor General's Office?

A. In the archive room.

Q. On what floor was that?

A. The third floor.

Q. Was any part of the contents of that room saved in the fire of April 18, 1906?

A. Only the papers that were in the safe.

Q. Where was the safe found after the fire?

A. In the basement.

Q. Did you have anything to do with opening up that safe?

A. I helped unpack the papers and repack them in boxes for removal to new quarters.

Q. You actually assisted in taking them out and packing them in new boxes? A. Yes.

(Testimony of Iva Frances Bailey.)

Q. For removal to the new office?

A. Yes.

Q. Have you seen the papers which you then unpacked recently?

A. Within the last two or three weeks.

Q. Whereabouts did you see them?

A. At the Glendale, California, Public Survey Office.

Q. Miss Bailey, you have referred to the fact that members of the public on occasions came to the Public Survey Office and asked for copies of records. Will you state to the Court whether or not there was any rule or practice in the Surveyor General's Office about permitting originals to be taken from that office?

A. They were not allowed to be taken out of that room.

Q. In all of your experience in the Public Survey Office do you know of any instance where originals of the California Land Com- [19] mission records were permitted to be taken out of the office?

A. Never, to my knowledge.

Q. When I say "taken out of the office," I do not mean taken out in the custody, for instance, of Mr. Barker, still retaining them in his custody, I mean where an original was withdrawn from the custody of the Surveyor General?

A. Never to my knowledge.

Q. Referring now to the rule as to the Mexican archives in California, was there any rule or prac-

(Testimony of Iva Frances Bailey.)

tice as to permission to withdraw originals from the custody of the Surveyor General?

A. They were never allowed to be taken out.

Q. In all your experience? A. Never.

Q. In all your experience was an original archive taken from the custody of the Surveyor General? A. Never to my knowledge.

Q. You said a few moments ago they were not even permitted to leave the archive room.

A. No.

Q. That is, you are referring to the third floor room?

A. To the room in which they were kept.

Miss Phillips: You may cross-examine.

Mr. Lipman: No questions.

CARL W. CALBREATH,

Called for the United States; Sworn.

Miss Phillips: Q. What is your occupation, Mr. Calbreath?

A. Deputy Clerk of this Court.

Q. When did you join the Clerk's Office of the United States District Court? A. In 1905.

Q. You have been with it in that capacity ever since?

A. With the exception of four years, when I was Judge DeHaven's secretary.

Q. Mr. Calbreath, have you made a search and examination of the records of the Clerk's Of-

(Testimony of Carl W. Calbreath.)

fice in the case of the San Francisco [20] Savings Union v. Irwin, I think it is numbered 3069?

A. 3140.

Q. Yes. A. I have.

Q. Did this search include a search of exhibits, orders, pleadings, and the like?

A. Yes, it did.

Q. How recently did you make that search?

A. Within the last two and a half or three weeks.

Q. Did you find any original title papers on file in the records of that case? A. No.

Q. When was this case tried, according to the records of your office?

A. The trial commenced on March 25, 1885.

Q. You do not have the date of its conclusion, do you? A. Yes.

Q. What was it?

A. It was argued before Justice Field and Circuit Judge Sawyer on July 17, 1885, and an opinion by Judge Field was filed on July 8, 1886.

Q. Have you made a similar examination and search of the records in the case of Bouldin v. Phelps, No. 2965? A. I have.

Q. Did you find any original papers actually in existence in that case? A. Yes.

Q. Specifically, did you find an original grant?

A. No.

Q. Did you find a certified copy of the papers in that case? A. I did.

(Testimony of Carl W. Calbreath.)

Q. By whom certified?

A. By the U. S. Surveyor General of Californi

Q. On what date?

A. The date he certified to it?

Q. Yes. A. I did not take it.

Q. You have the original?

A. The original is in 2965 records there.

Q. This is an exhibit on file in that case, a I have had a photograph with the Surveyor Ge eral's Certificate, a certified copy which I propo to file as my next exhibit, leaving the original ce tified copy in the files of Bouldin v. Phelps. [2 You have the original exhibit there?

A. No, I have not. It is in the file of 2965.

Q. You have the original file?

A. Yes, it is in the file there. I have it.

Q. You have it there? A. Yes.

Miss Phillips: I would like to direct the atte tion of the Court and have the record show th the certified copy on file in Bouldin v. Phelps h the signature of the Surveyor General and has its face, on the face of his certificate, his seal office. This document, your Honor, I now of in evidence as Government's Exhibit next in der—it will be Exhibit C—for the purpose of sho ing that on October 19, 1886, the grant of Ma Island by Alvarado was in his possession on tober 19, 1886, as part of the original records of t Land Commission on that date, then in his custo

Mr. Lipman: I have no objection whatever the offer of the photograph instead of the certifi

(Testimony of Carl W. Calbreath.)

copy in the case, but I object to the exhibit on the ground, first, that it does not affect any of the lands in this suit, and, in the second place—I think you limited your offer merely to proving that this document was on file on that date?

Miss Phillips: I am showing the original was on file in this office on that date. I have shown by a witness in the staff of the Surveyor General's Office in 1894 the practice of the Surveyor General was to permit no original to be withdrawn. I can also direct the attention of the Court, if needed, to the Penal Statute, making it a penal offense to take original documents from the custody of the Surveyor General without his permission. I have shown by the fire of 1906 a destruction of all documents, save those in the safe, and I have shown by Mr. Barker a search of all of the archives of his office and [22] a failure to find any of the documents which were part of the inventory of the Land Commission records in so far as they apply to Mare Island.

The Court: Mr. Lipman merely asked you the purpose of your offer, Miss Phillips.

Mr. Lipman: The point I am trying to get at is, of course we deny any original grant was made. We do not think this exhibit proves the original grant was made, and we object to it as showing any original grant was made. I have no objection to it as showing that some document stated to be the original of which that is a copy was on file

(Testimony of Carl W. Calbreath.)

with the Surveyor General at the time it was made, but I object to it on the ground it is immaterial, because it does not affect the lands in suit, and if it is offered to show there was any such grant it is not proof of it.

The Court: The objection is overruled.

Mr. Lipman: I note an exception.

Miss Phillips: You may cross-examine.

Mr. Lipman: No questions.

(The document was marked "U. S. Exhibit C.")

(Omitted by designation from this printed Transcript of Record.)

Miss Phillips: I now offer in evidence, your Honor, as Exhibit D, two volumes—they are certified copies of Case No. 311 in the United States District Court entitled "United States v. Bissell & Aspinwall; this appears in two volumes, Volume 1 being a certified photographic copy of the transcript in the case before the Land Commission, No. 311, and the second volume of the record being the case as it appears in the District Court, the rule of law being that the Land Commission, on the completion of its case, file this record in the District Court, and then proceedings are started again from there. I have segregated [23] it in two volumes for that reason, and I ask this to be marked Exhibit D-1 and D-2, the numbers being in order of volumes, Volume 1 being the Land Commission

record, and Volume 2 being the District Court record.

Mr. Lipman: May it please the Court, this is a very important portion of the evidence, and I wish to state quite carefully and in detail my objections to it. No objection is made to the point that this is merely a photograph of the file in the Clerk's Office. However, we do object to the entire record on the first ground that it is incompetent, and is irrelevant, and immaterial; if offered for the purpose of proving confirmation we object to it on the ground, first, that it does not appear that the confirmation affected any of the lands in this suit. We object to it on the second ground that it affirmatively appears from the pleadings that before the proceedings before the Land Commission were had the Government had purchased the claim of the plaintiff and that therefore there was no real adjudication, and on that ground the exhibit is not binding on the defendants, and has no materiality in this case, and should be excluded. The grounds upon which we make that claim are the same ones which I have stated to your Honor in connection with our opening statement, and I do not think I need to repeat that here. Furthermore, we object to the exhibit offered as a whole on the ground that even if the confirmation proceedings were material in this case the exhibit as a whole contains a vast amount of material that is not proper to be included in the proof of an adjudication; the way you prove an adjudication is not to offer the entire

record which is on file with the Clerk, but to offer just the equivalent of a judgment roll which we believe to be at the most in this case the petition before the Land Board, the answer, the findings or opinion of the Land Board, and its decree, and the minute order in the District Court, [24] and the final decree in the District Court. We ask the Court to rule first that none of the exhibit is admissible on the grounds stated, and I would like to ask for a ruling on that, first.

Miss Phillips: As to the minute order, counsel has anticipated me. My next exhibit is a photostat copy of the minute order. I shall present that.

Mr. Lipman: Was not the minute order included in this?

Miss Phillips: I believe not.

Mr. Lipman: Then it is not the entire file in the Clerk's Office.

Miss Phillips: The minute order appears on the docket. I have a photostat copy of the order as it appears on the docket. The entire file in that case as certified appears in Exhibit D; the actual minute order in the Clerk's Docket is on a separate page, which I am presenting, and may I put it in now so as to have the exhibit here as a whole? I wish to have this marked Government's Exhibit D-3.

The Court: Very well.

Mr. Lipman: It will be understood that the objection I made runs to D-3?

The Court: Yes.

Mr. Lipman: I ask your Honor first to rule on the objection to the entire exhibit as not being a proper exhibit, because, as I said, it does not affect the lands in this suit.

The Court: How can I decide that now? I do not know whether it affects the lands in suit or not. How can I decide that now?

Mr. Lipman: I do not know, your Honor.

The Court: I will rule on it.

Mr. Lipman: I want to make the objection, because we think the objection is good, and I do not want to be in the posi- [25] tion of waiving objections.

The Court: The objection is overruled and an exception noted.

Mr. Lipman: Then I wish to ask that all of the exhibit be excluded on the additional ground that even to prove confirmation the entire file is not admissible; that only what would be equivalent to a judgment roll would be.

The Court: How can you be injured by the offer of the entire file? What difference does that make?

Mr. Lipman: It makes this difference, your Honor, there is a vast amount of material in that file that perhaps can be used to show something other than confirmation, and we are entitled to know, we believe, exactly what is before this Court, and for what purpose. Otherwise we cannot make intelligent our objections.

The Court: Maybe Miss Phillips can make that clear.

Miss Phillips: I think I can. I offer that exhibit for three purposes; the first is this, to show the confirmed title to Mare Island, confirmed by the Land Commission and by the District Court to Bissell & Aspinwall, and I propose to show that the line of title from them to the United States—that is, we are relying on a confirmed title.

The Court: That is the first purpose. What is the next?

Miss Phillips: The second purpose we offer that for is to show a pending claim, a claim pending with the Land Commission, which, regardless of the merits of the claim, kept all the land of Mare Island reserved until that pending claim was decided for good or for ill; whether the Land Commission confirmed that claim or denied that, we offer that evidence to show a pending claim. Now, as I understand the authorities—

The Court: Why discuss that now?

Miss Phillips: Very well, to show a pending claim. [26]

The Court: What is the next purpose?

Miss Phillips: Thirdly, I offer the depositions and the entire record in that case, regardless of the fact of confirmation or lack of confirmation, as evidence taken between the United States and the defendants' precessors in interest, and binding on them, to show a bona fide claim to the Island, a bona fide occupation of that Island, the purpose of

that being to show that this land was in a status of reserved land under the Treaty of Guadaloupe Hidalgo.

The Court: Will not the objection you have made go to all of it?

Mr. Lipman: My first general objection goes to the entire record.

The Court: Yes.

Mr. Lipman: My objection goes to the entire record for all three purposes stated by counsel.

The Court: The objection is overruled; and an exception.

Mr. Lipman: Now, then, specifically—

The Court: Why "specifically"? Isn't one objection sufficient? You have a general objection and now you want to split it up and have a specific objection?

Mr. Lipman: There may be 50 or 75 documents there. It is possible that one of those documents may be offered for some purpose, and if any were admissible perhaps the objection to the whole would not be good. I just want to be sure that my objection to everything that is immaterial in here is part of the record.

The Court: Very well.

Mr. Lipman: I object to any part of the exhibit to prove either confirmation or that there was a claim pending other than what would constitute the judgment roll, as I have stated. [27]

The Court: Overruled, and an exception.

Mr. Lipman: I object to any portion of any of

those depositions being offered in evidence, on the ground that, other than the objections I have made, it was stated they were offered to prove, as I understand, a claim pending; I object to them because they are wholly incompetent and immaterial, they are the clearest kind of hearsay. The depositions show on their face that they were not taken until long after the state title was initiated, and they could not in any way or respect be binding on any of these defendants.

The Court: Overruled; and an exception.

Mr. Lipman: Your Honor, I would ask finally that the entire exhibit be limited strictly to proof of the points for which counsel has stated that it has been offered.

The Court: Overruled.

Mr. Lipman: May I have an exception to all of the rulings, your Honor?

The Court: Yes.

Mr. Olney: If your Honor please, in connection with this exhibit, might I ask Miss Phillips a question which occurs to me? The announced purpose of the offer by counsel was to show by the depositions a pending claim.

Miss Phillips: Just a moment. I have outlined that specifically. I can have the offer read back; counsel may have forgotten it.

Mr. Olney: My point is just this, in connection with it, so far as the purpose of showing the pending claim at the taking of the depositions, your Honor has ruled upon that point, but the thing

that I am fearful of in connection with that is that it would be attempted then to use the depsoitions to prove the things that are testified to in the depositions; that is just [28] pure hearsay, if they are not offered for that purpose all right. The matter has been ruled on. But if it is expected hereafter to use these depositions as proof of what is testified to in the depositions it is clearly hearsay and not a matter binding between these parties, and to that extent I think we should object to the use of the depositions.

The Court: Miss Phillips was called upon by the Court to state the purpose for which she offered the evidence, and I think she made a clear statement of the purpose. I do not understand, Mr. Olney, that it was offered for any such purpose as you have stated.

Mr. Olney: I wished it to be very clear on that very point.

Miss Phillips: I stated the purpose for which it was offered as clearly as I could, and your Honor will recall I do not mumble when I talk in court, as I do not want to force them to strain their ears to hear me. Each of the purposes which I have stated in my offer I intend to rely on.

The Court: Yes.

Miss Phillips: In the argument of this case, on any occasion.

Mr. Olney: There is no criticism of you, Miss Phillips, I merely wanted to make it perfectly

clear, in view of what has come to the attention of his Honor, that these depositions are not being offered at this time as proof of what was testified to in the depositions.

Miss Phillips: I believe I will have to have my offer read back.

The Court: If you wish it read back you may have it read.

(The record was here read by the reporter.)

I think it is quite clear, Judge Olney, that the documents are offered for three purposes, first to show confirmation, [29] second that there was a pending claim, and, third, that there was evidence taken of that claim, and that the land was reserved.

Mr. Olney: I understand that, but that is not the point I wish to emphasize. What I am trying to get from Miss Phillips' statement is—

Miss Phillips: It is not possible for me to state it any clearer, but I wish to say right now that the claim of these defendants that the United States was not the predecessor in interest of these defendants would indicate to me that they have no title at all. Either the United States is their predecessor in interest or they have not got a title. Now, then, if in that claim before the Land Commission depositions were taken, testimony was taken, and a record was made showing occupation of this land, we claim that that evidence shows a reservation of the land under the Treaty of Guadalupe Hidalgo;

even had the Land Commission decidedly adversely to the grant, we still claim there was occupation and a bona fide claim to a grant sufficient to make the status of this land the status of reserved land, and therefore not passing under the Swamp and Overflow Act of 1850. I cannot make it any clearer than that.

Mr. Olney: Might I suggest, to bring this matter to an end, without waiving any rights in the matter, your Honor overrule the objection, bearing in mind that we have specifically made the objection that these depositions may not be used to prove anything that is contained in them, any testimony as to any of the facts there testified to, so that our point in that connection may be reserved.

The Court: Yes, objection overruled, and an exception.

Mr. Lipman: I want to make the additional objection that the depositions were taken after the title passed out of the United States, and the United States cannot by a subsequent suit [30] in which they take evidence make that evidence taken evidence against us and within the ordinary exception to the hearsay rule; so I want to object to these depositions as pure hearsay and *on* binding upon the defendants.

The Court: Overruled, and an exception.

(The documents were marked U. S. Exhibits D-1, D-2, and D-3:) (U. S. Exhibits D-1, D-2 and D-3 are set forth in Vol. V, pages 1, 73 and 140 of this printed Transcript of Record.)

Miss Phillips: I now offer in evidence as Government's Exhibit next in order a certified copy of a report to the Secretary of War and Navy dated March 31, 1850, with map attached. This purports to be a report by Col. Smith, senior member of a board appointed and selected for the purpose of selecting harbor fortification reservations and the like in San Francisco Bay. I offer that in evidence as Exhibit E-1, and attached to it as Exhibit E-2 a certified copy of an order made by President Fillmore on November 6, 1850 and ask that the exhibits be marked in order I have indicated.

Mr. Lipman: If your Honor please, I want to object. The two exhibits are quite different, so I have to make different objections to them. The Smith Board report we do not object to. The Presidential reservation we do object to; in the first place it is admitted by the pleadings that Mare Island was reserved and in the second place the reservation does not affect any of the lands in suit.

The Court: Overruled; an exception.

(The documents were marked U. S. Exhibits E-1 and E-2.) (U. S. Exhibits E-1 is set forth in Vol. III, page 4 of this printed Transcript of Record; U. S. Exhibit E-2 is set forth in Vol. III, page 11.)

Miss Phillips: I now offer in evidence, your Honor, a report of a Board of Officers headed by

I. B. Sloat, Senior Officer of the Board, in which he reported to the Secretary of the Navy, or, rather, reported upon the selection of a site for the establishment of a navy yard and depot in San Francisco Bay. The report is dated November 6, 1852, and is certified by the Secretary of the Navy, Mr. Swanson. [31]

Mr. Lipman: I understand that several of these are going to be offered in evidence, and I have no objection.

(The document was marked "U. S. Exhibit F.") (U. S. Exhibit F-1 is set forth in Vol. III, page 13 of this printed Transcript of Record; U. S. Exhibit F-2 is set forth in Vol. IV, page 1.)

CARL A. CARLSON,

Called for the United States; Sworn.

Miss Phillips: Q. What is your occupation?

A. Captain in the Corps of Civil Engineers, United States Navy, on duty as Public Works Officer at the Mare Island Navy Yard, California.

Q. How long have you been in the Navy, Captain? A. Since 1903.

Miss Phillips: I am going to call this witness later on, but at the present time my examination will be very brief.

Q. Are you familiar with the report of the commission headed by Commodore Sloat, a copy of

(Testimony of Carl A. Carlson.)

which has just been offered in evidence as U. S. Exhibit F? A. I am.

Q. Did you ever make a search of the archives of the Navy Department for maps which may have been attached to or a part of the Sloat Board report? A. I did.

Q. Did you make as thorough a search as you could? A. As thorough as I could.

Q. When did you make this search?

A. In 1930 and 1931.

Q. Did you find any maps? A. I did.

Q. Did you find the originals of the maps which I now show you, certified copies of which I now hand you? A. I did.

Q. You found the originals in the archives?

A. I did.

Q. Were they attached to the Sloat Board report? They were not.

Q. They were loose in the file of the office in the Navy Department?

A. They were in the drafting room file of the Bureau of Yards and Docks of the Navy Department.

Q. Have you made a search for any other maps for the purpose of identifying the maps which were a part of the Sloat Board report? [32]

A. Yes.

Q. You made this search in 1930 or 1931?

A. Along in there.

(Testimony of Carl A. Carlson.)

Miss Phillips: I am going to offer this in evidence as Exhibit F-2. I offer it under the same letter—it really should be considered as part of that report. I have a witness here who can testify as to a search made within the last two weeks, a similar search, if counsel wishes to have further testimony of the search on our part.

Mr. Lipman: No.

Miss Phillips: Q. Captain Carlson, do you know the Navy Yard at Mare Island and all of the surrounding country? A. Yes.

Q. You have had three tours of duty at Mare Island, have you not? A. Yes, I have.

Q. The large mounted photograph which I now show you, mounted on an easel, can you tell the Court what this is?

A. This is an aeroplane photograph of the entire area, taken by a Naval aviator with a photographer.

Q. Taken when?

A. The date is given there.

Q. The date appearing on it is April 4, 1934. Do you believe that to be a correct representation of the land area which it represents?

A. As of that date.

Miss Phillips: I can bring the photographer here if need be, your Honor. Do you require that?

Mr. Lipman: No.

Miss Phillips: I am going to have that marked later on in the case, but I wish the maps to go in

in a particular order. Have you any cross-examination of Captain Carlson?

Mr. Lipman: No, I have not.

Miss Phillips: I now offer in evidence as Exhibit G President Fillmore's reservation of February, 1853, of Mare Island, and with it, as a part of the exhibit, I am offering the corres- [33] pondence from the Secretary of the Navy to the President, and his transmission of the reservation to the Secretary of the Interior. This is a certified copy certified by the Assistant Commissioner of the General Land Office.

Mr. Lipman: Our objection to this exhibit is the same as to the other presidential reservation, that is, that it does not affect any of the lands in this suit. Furthermore, the reservation of Mare Island, itself, is admitted by the pleadings.

The Court: Objection overruled.

Mr. Lipman: Exception.

(The document was marked "U. S. Exhibit G.") (Set forth in Vol. III, page 58 of this printed Transcript of Record.)

Miss Phillips: I now offer in evidence as Government's Exhibit H the deeds to Mare Island and accompanying record, filed in Sonoma County, certified by the County Recorder as a true and correct copy of documents there on file.

Mr. Lipman: I wish to object to the offer of this evidence on two grounds; first, that none of the deeds or documents in that file pertain to the lands in controversy; second, upon the ground that

there is no proper foundation laid because there is no showing of title in Bissell, Aspinwall and McArthur, who are the grantors in the principal deed.

The Court: What have you to say as to the first part of the objection, Miss Phillips, which is that it does not apply to the lands in question?

Miss Phillips: It is a deed of Mare Island, your Honor. I think that simply goes to the question of fact.

The Court: Objection overruled.

Mr. Lipman: Exception.

(The document was marked "U. S. Exhibit H.") (Set forth in Vol. III, Page 66 of this printed Transcript of Record.)

Miss Phillips: May I now have identified, and I offer in evidence the large aeroplane photographic map; I ask that it be [34] marked Government's Exhibit I.

Mr. Lipman: I have no objection to that map, your Honor, showing the conditions at the time the map was made. I understand it is not offered for any other purpose?

Miss Phillips: I think I can show that the present conditions, the conditions to-day, are not substantially different.

Mr. Lipman: I mean nothing back of 1934.

Miss Phillips: I don't want a blanket objection like that. Here is San Pablo Bay shown. Does

counsel say that in 1853 San Pablo Bay was no there, that that was all desert land? I think I ca show that many conditions shown on that map ar conditions obtaining in 1850, and for that matte in 1800.

Mr. Lipman: I object to the map as showin conditions other than at the time the map wa made, and as being wholly immaterial and irrele vant, because what the conditions are today are no material here.

Miss Phillips: That will be connected up, you Honor.

The Court: Very well, overruled.

Mr. Lipman: Exception.

(The photographic map was marked "U. S. Ex hibit I.") (Omitted, by designation, from thi printed Transcript of Record.)

PAUL A. SMITH,

Called for the United States; Sworn.

Miss Phillips: Q. What is your name?

A. Paul A. Smith.

Q. What is your occupation?

A. Hydrographic and geodetic engineer in th Coast & Geodetic Survey.

Q. When did you join the United States Coast & Geodetic Survey? A. In August of 1924.

Q. Where is your present station of duty?

(Testimony of Paul A. Smith.)

A. Washington.

Q. Will you state what has been your professional training and experience for the occupation in which you are now engaged? [35]

A. I have been assigned to the Hydrographic and Topographic Surveys in the Coast and Geodetic Survey in various parts of the Coast of the United States, Alaska, and the Philippine Islands. Also on geodetic control surveys in many of the States.

Q. Have you had actual experience in the field, that is, in the collecting of material to be used by the Coast & Geodetic Survey in the making of maps and charts? A. Yes.

Q. And in Alaska? A. Yes.

Q. And in the Philippines? A. Yes.

Q. And in other parts of the United States?

A. That is right.

Q. What was your education and training prior to joining the Coast and Geodetic Survey?

A. From the University of Michigan I had a degree of Bachelor of Science in Geodesy and Surveying. I was teaching assistant in the Department of Geodesy and Surveying in the University of Michigan. Thereafter I joined the Coast & Geodetic Survey.

Q. Are you familiar with the methods of the Coast & Geodetic Survey in the making of maps and charts? A. Yes.

Q. Are you familiar with the past maps as well as the present?

(Testimony of Paul A. Smith.)

A. Yes, from reading the reports of that work.

Q. And the specifications?

A. That is right.

Q. Have you had any experience in the correlation of maps, in reviewing maps, in bringing maps up to date, that is to say, present maps from a study of past maps?

A. I don't just understand what you mean by that.

Q. I am not a geodetic engineer, as you will very soon find, if you have not already found. I would like to know what has been your experience at headquarters?

A. My present position there is assisting in the preparation of all of the instructions to field parties of the Coast and Geodetic Survey, making hydrographic and topographic surveys similar to those in question, I [36] believe in this case.

Q. Have you had any experience in assembling material so collected?

A. Yes, in the preparation of those instructions it is necessary to consult these old records particularly, and compare the natural and the artificial and other changes that may have occurred between the old surveys and those contemplated.

Q. And your experience required you to engage in the study of old maps and charts? A. Yes.

Q. The Coast & Geodetic Survey has archives, has it not, of its own work in the past?

A. Oh, yes.

(Testimony of Paul A. Smith.)

Q. Does it contain in its archives maps prepared by organizations or by persons other than the Coast & Geodetic Survey? A. Yes.

Q. Lieutenant Smith, did you find copies of any of the old maps of San Pablo Bay and San Francisco Bay in the archives of the Coast & Geodetic Survey? A. Yes.

Q. I am now tendering you, Lieutenant Smith, photostat copies of several maps, all certified by the Coast & Geodetic Survey as true copies of maps in the archives of their office. The first one which I am tendering you is a plan of San Francisco Bay, registered by the packet boat of the "San Carlos" under the command of D. M. Manuel Ayala, dated 1775. I will state to your Honor that I am going to offer these early maps under one designation and question the witness on them. Their value is largely historical and partly factual. I will identify them first and then ask questions on them. The first one I have identified is the one I have just described. The second one is a plan of the port of San Francisco, made by the pilots of the "San Blas." The third is a plan of the port of San Francisco purporting to be made in 1781. The fourth is a plan purporting to be made from a Spanish manuscript by John Parks, and published [37] by one Dalrymple. The fifth is a plan of the port of San Francisco, made in 1825. The sixth is a plan dated 1798. The seventh—I am afraid I have these in the wrong order, your Honor.

(Testimony of Paul A. Smith.)

I will have these marked for the present. Exhibit J-1 will be the Ayala map. I am sorry to say, your Honor, that the maps were placed in the wrong order. It is embarrassing to me to have to say that. Ayala's is 1775. Canizares is 1781. The Dalrymple is 1789. A fourth map is 1798. A fifth one is dated 1825, a plan of the Port of San Francisco. The sixth is likewise a plan of the Port of San Francisco, dated 1825. Lieutenant Smith, are you familiar with these maps which I have described and which I have now handed you?

A. These are all photostatic copies of the originals, they are so certified.

Q. Are the originals of those in the archives of the Coast & Geodetic Survey? A. They are.

Miss Phillips: I offer these in evidence, your Honor, as our exhibits next in order, J-1, J-2, J-3, J-4, J-5, and J-6.

Mr. Olney: It seems to me, your Honor, these maps add nothing to this case and simply encumber the record.

Miss Phillips: It is a matter of evidence, your Honor. The evidentiary value may be slight. I think the objection goes to the weight of the evidence.

Mr. Olney: My objection is that they have no weight at all. They simply don't mean anything.

Miss Phillips: If they don't mean anything you are not injured in having them in. I say they do mean something.

(Testimony of Paul A. Smith.)

Mr. Olney: They simply encumber the record. I will withdraw the objection.

(The maps were here marked U. S. Exhibits J-1, J-2, J-3, J-4, J-5, J-6.) (Omitted, by designation, from this printed Transcript of Record.)

Miss Phillips: Q. Lieutenant Smith, are you familiar with [38] these maps? A. Yes.

Q. Is it possible to identify on these old maps, Exhibit J, bodies of water or bodies of land which appear in the later maps of San Francisco Bay and San Pablo Bay? A. Yes.

Q. Can you identify Carquinez Straits, for example? A. Yes.

Q. San Pablo Bay? A. Yes.

Q. San Francisco Bay? A. Yes.

Q. Is it possible to identify on any of them other well-known landmarks? A. Yes.

Q. For example, some of the islands?

A. Some of the islands and prominent points on the bay.

Q. When you say you can identify bodies of water and bodies of land as I have mentioned, tell us how you identify them.

A. By their relative positions as they are known to exist today.

Q. By comparing these with later and more accurate maps?

A. That is right.

Q. Can you identify on any of these maps a

(Testimony of Paul A. Smith.)

land area which you take to be Mare Island?

A. Yes.

Q. Do any of these old maps show a water course crossing the tract of land which you have identified as Mare Island?

A. There were none.

Q. I now tender you a certified copy of a map and ask you if you can identify that map.

A. This is the map of the harbor of San Francisco, certified by Captain F. W. Beachey in 1827 and 1828. It is so stated in the title.

Q. Who was Captain Beachey?

A. He was an officer in the British Navy who had been sent out on exploring expeditions. He was hydrographer and explorer.

Q. Can you identify Mare Island as it appears on that map?

A. Yes, it can be identified quite easily.

Q. How do you identify it?

A. By its relative position in what [39] is shown on this map as the Bay of San Pablo and Carquinez Straits, which are so marked.

Q. By the way, San Pablo Bay appears on the older maps under what name?

A. You refer to these ancient maps, do you?

Q. Yes Exhibit J, the ancient maps.

A. I believe it is Bahia Redonda.

Q. You identify Mare Island as a tract there appearing in San Pablo Bay by its relationship to Carquinez Straits? A. Yes.

(Testimony of Paul A. Smith.)

Q. What have you to say as to the appearance of accuracy of this map as compared with the maps which we have offered in evidence as Exhibit J?

A. This appears to be by far the most carefully constructed map of any of them I have looked at up to now.

Mr. Olney: Q. When you say, "Any of them I have looked at up to now," you refer to the maps which are already in evidence?

A. That is right.

Miss Phillips: Q. Do you find any of the sloughs which appear in later maps?

A. I take it you mean these in the northeastern extremity of San Pablo Bay?

Q. Yes.

A. Yes, there are evidences of sloughs flowing from the northeastern part of the land bordering what we know as Mare Island Straits and Napa River.

Q. How far northerly does Beachey appear to have carried his soundings?

A. Only a short distant up Napa River to the northern extremity of San Pablo Bay. Beyond that he has not shown any details.

Miss Phillips: I offer this in evidence, your Honor, as our Exhibit K-1. I would like to direct the attention of the Court at this time to the fact that the copy of a map which appears as a part of the report made by the Smith Board in 1850,

(Testimony of Paul A. Smith.)

recommending the first naval reservation, has as a part of that report Beachey's map. [40]

(The map was marked "U. S. Exhibit K-1.") (Set forth in Vol. IV, page 3 of this printed Transcript of Record.)

Q. I now tender you and ask if you can identify a map also certified by the Coast & Geodetic Survey as a true copy of the original on file as a part of the archives of that office.

A. Yes, this is a photographic copy of a map of the Sacramento River and the Bay of San Pablo, with the harbor of San Francisco, by the United States Exploring Expedition of 1841. It is so stated in the title.

Q. Is that also known as the Wilkes Expedition?

A. I don't know whether it was known as the Wilkes Expedition; he was in command of the expedition.

Q. Do you know what the purpose of the Wilkes Expedition was?

A. It was a general scientific expedition sent out to obtain information about the customs, the languages of the people, and to make oceanographic, hydrographic and exploratory investigations and surveys such as are shown on their maps submitted here.

Q. You say Wilkes was in command of it: do you know the names of any of the other officers

(Testimony of Paul A. Smith.)

associated with Wilkes in the making of maps on his exploratory expedition?

A. I think Stuart was also associated with him. I don't recall any of the others.

Q. Does Mare Island Straits appear on the Wilkes map? Can it be identified on that map?

A. Yes, it is very evident from this map; there are soundings shown in it.

Q. Comparing this map with Beachey's map, would you say that the hydrographer of this expedition went farther than Beachey, or did he stop short of Beachey's explorations?

A. As I recall the other map, this has more detail of the shore line shown farther back from the Bay. You refer particularly, I suppose, to San Pablo Bay? It also shows a greater extent of the Sacramento River.

Q. I meant in particular, does it show that he had gone farther [41] back in taking soundings in the Mare Island area than Beachey?

A. Yes, he did.

Q. Who was the hydrographer of that expedition? A. Stuart was the hydrographer.

Q. Do you identify Mare Island as it appears on the Wilkes map?

A. The area that is shown on here can be identified as Mare Island, although the survey does not go far enough north to complete the extent of the island.

Q. This map would show it as a peninsula. It

(Testimony of Paul A. Smith.)

stops short of showing complete water boundaries, does it?

A. There is no information farther north than several miles back of the Bay of San Pablo; it is not shown as complete.

Q. So far as that map shows or represents Mare Island, is there any evidence of a water course or a waterway crossing the Mare Island area from Mare Island straits and San Pablo Bay?

A. No, there is not.

Miss Phillips: I offer this map in evidence, your Honor, as U. S. Exhibit K-2.

(The map was marked "U. S. Exhibit K-2.")

(Set forth in Vol. IV, page 4 of the printed Transcript of Record.)

Q. Can you identify the map which I now hand you, Lieutenant Smith?

A. This is the title page and map prepared by a French naval officer who was attached to the Legation of France in Mexico as the title page shows, it is dated 1844.

Q. The original of that map is in the archives of the Coast Survey? A. Yes.

Q. Do you know anything about the circumstances under which this map was made, other than as given in the title?

A. No, none other than as given in the title.

Q. Is it possible to identify the Mare Island area on that map?

(Testimony of Paul A. Smith.)

A. Yes, it is easily identified by its characteristic shape.

Q. And its position as between Mare Island Straits and San Pablo [42] Bay?

A. That is right.

Q. Is there any evidence of a water course crossing the Mare Island area from San Pablo Bay to Mare Island Straits upon the French map which you have just identified? A. No.

Miss Phillips: I offer this in evidence as U. S. Exhibit K-3.

(The map was marked "U. S. Exhibit K-3.")
(Set forth in Vol. IV, page 5 of this printed Transcript of Record.)

Q. I now offer you a map purporting to be a certified copy of an original in the archives of your office, and ask you if you can identify that map.

A. Yes, this is a map, as the title shows, "A correct map from actual surveys and examination embracing a portion of California between Monterey and the Prairie Buttes."

Q. What is the date of that map, as nearly as you can ascertain it from the face of it?

A. It is dated thereon 1849, drawn by F. D. Stuart.

Q. Was Stuart the hydrographer with the Wilkes expedition? A. Yes.

Q. Does Mare Island Straits appear on that map? A. They are not so marked.

(Testimony of Paul A. Smith.)

Q. But can you identify a body of water which later maps name Mare Island Straits?

A. Certainly.

Q. Can you identify San Pablo Bay?

A. Yes, it is also so marked.

Q. And Carquinez Straits?

A. Yes, they are also so marked, and they are easily identified.

Q. Is Mare Island represented upon that map, on the Stuart Map?

A. The tract of land that can be recognized as similar to Mare Island is shown on this map as a peninsula.

Q. It does not appear by name?

A. No, it does not.

Q. Do you find any evidence of a water course crossing the Mare Island tract from Mare Island Straits into San Pablo Bay, as shown upon the Stuart map which you are now holding in your hand? [43]

A. No, there is no evidence of such a water course.

Q. Would you say that the shore line from Carquinez Straits northward in the Mare Island area is an unbroken shore line?

A. Do you mean in the Bay of San Pablo?

Q. Yes. A. Yes.

Q. What can you say as to the shore line, whether it is broken or unbroken?

A. The shore line is shown on this map from the southern extremity of Mare Island to Sonoma

(Testimony of Paul A. Smith.)

Creek as continuous and unbroken.

Miss Phillips: I would like to have this marked U. S. Exhibit K-4.

(The map was marked "U. S. Exhibit K-4.")

(Set forth in Vol. IV, page 6 of this printed Transcript of Record.)

Q. Can you identify the map which I now hand you, Lieutenant Smith?

A. Yes, this is Gibbs' map of Gold Region in California, published in 1871; it so states in the title from his own and other recent surveys and explorations.

Q. The original of that map is on file in the office of the Coast & Geodetic Survey?

A. Yes.

Q. Do you know anything about Gibbs?

A. He was a map publisher; I don't know anything about him.

Q. Can you identify on that map the Mare Island tract?

A. Yes, it is shown on this as a peninsula, also.

Q. You identify it by what bodies of water adjacent to it?

A. By San Pablo Bay, which is so marked; by Carquinez Straits; by the town of Vallejo, which is also shown.

Q. Is there any evidence of a water course crossing from Mare Island Straits to San Pablo Bay upon that map? A. No.

Q. What can you say as to the shore line from

(Testimony of Paul A. Smith.)

Carquinez Straits northward in the Mare Island tract, is it a broken shore line or unbroken?

A. The shore line of San Pablo Bay along the peninsula that can be recognized as the Mare Island area is [44] continuous and unbroken from the southeastern extremity to Sonoma Creek.

Q. And what as to the shore line on the Mare Island Straits side?

A. On the Mare Island Straits side, which runs into what he has marked as Napa River, there is one creek flowing into Mare Island Straits, but no other indication of water.

Q. The creek flowing into Mare Island Straits, does the map show where the head of that could be?

A. It is about half way between Sonoma Creek and Napa River, which are marked.

Miss Phillips: I offer this map in evidence as Plaintiff's Exhibit K-5.

(The map was marked "U. S. Exhibit K-5.")

(Set forth in Vol. IV, page 7 of this printed Transcript of Record.)

Q. I now tender you a group of four maps together, and we will identify them and then I will offer them in evidence singly after we discuss them.

The Court: We will continue the trial now until two o'clock this afternoon.

(A recess was here taken until two o'clock p. m.)

[45]

(Testimony of Paul A. Smith.)

Afternoon Session.

Paul A. Smith,

Direct Examination (Resumed)

Miss Phillips: Q. Lieutenant Smith, can you identify the four maps which I now hand you?

A. Shall I identify these as I look at each one of them?

Q. Yes, please.

A. The first map which I have is a general chart of the Farallones.

Q. What does it show?

A. It shows the entrance to the Bay of San Francisco, San Pablo Bay, with sheets showing Carquinez, Suisun Bay, the Sacramento and the San Joaquin, made by Cadwalader Ringgold, Commander U. S. Navy in 1850.

Q. What is the second one?

A. The second one is a chart of the Farallones and entrance to the bay of San Francisco, California, made by Cadwalader Ringgold, Commander U. S. Navy, assisted by Simon S. Blunt, Lieutenant in the U. S. Navy. This is sheet No. 1 of that particular series.

Q. What is the next?

A. The third is chart of the Bay of San Pablo, Straits of Carquinez, Bay of San Francisco, made By Cadwalader Ringgold, assisted by Simon S. Blunt, Lieutenant U. S. Navy, 1850.

Q. What is the next one?

(Testimony of Paul A. Smith.)

A. The fourth is a chart of Suisun and Vallejo Bays, showing the confluence of the Sacramento and San Joaquin Rivers, made by Cadwalader Ringgold, Commander U. S. Navy, assisted by Sam R. Knox, Lieutenant U. S. Navy, William P. Humphries and J. H. Rowe, assistant engineers. It also carries a note, "Constructed, projected and drawn by Fred D. Stuart, Hydrographer."

Q. It shows the confluence of the Sacramento and San Joaquin Rivers? A. Yes.

Q. That is a part of the title, is it not?

A. That is right. [46]

Q. Is that marked Sheet No. 3?

A. That is marked Sheet No. 3, yes, in the upper left-hand corner.

Q. Who was Cadwalader Ringgold?

A. Cadwalader Ringgold, as stated in the title, was Commander in the U. S. Navy. He prepared and published these maps in 1850.

Q. Do you know anything about Cadwalader Ringgold's standing as a hydrographer and map maker?

A. He was one of the most outstanding hydrographers of his time.

Q. Did Ringgold make any other maps of the region shown in the four maps you have referred to, in other words, are there any additional maps?

A. He made six maps, one as a general chart, and five others which are described in his publication.

(Testimony of Paul A. Smith.)

Q. I now tender you a record from the Bancroft Library, at the University of California, showing two charts or maps additional to those which you have just identified. I am going to ask you in which of the four charts you have in your hand, and the two additional charts in the record from the Bancroft Library which I have handed you, Mare Island appears. I don't want to offer all the maps in evidence unless they are pertinent.

A. You wish me to inspect these for that purpose at this time?

Q. Yes, inspect each one of those and tell us on which of these maps Mare Island is represented.

A. In the general chart of the Farallones and the Entrance to the Bay of San Francisco it is shown.

Miss Phillips: I offer that in evidence as Plaintiff's Exhibit K-6.

(The chart was marked "U. S. Exhibit K-6.")
(Set forth in Vol. IV, page 8 of this printed Transcript of Record.)

Q. Now, take the next one.

A. It does not appear on Ringgold Chart Sheet No. 1; the limits of the sheet do not extend that far to the northward. It is shown on his chart of the Bay of San Pablo, which is labeled his Sheet No. 2. [47]

(Testimony of Paul A. Smith.)

Miss Phillips: I offer this in evidence, your Honor, as Government's Exhibit K-7, Ringgold Sheet No. 2.

(The document was marked "U. S. Exhibit K-7.") (Set forth in Vol. IV, page 9 of this printed Transcript of Record)

Q. Now take the next.

A. It does not appear on his Sheet No. 3; it is westward of the western limits of that sheet. His Sheet No. 4 does not show it. This present sheet which I have is not labeled by number, but apparently it is Sheet No. 5, which is the large scale map of harbors and anchorages. The southeastern extremity of it appears in part on this.

Q. You are referring to the last of the six maps bound together in the book from the Bancroft Library, the book which I have tendered you?

A. Yes.

Miss Phillips: Your Honor, this is a very valuable book. The Bancroft Library loaned this to us with the request that it be returned. I am going to ask leave of the Court to have this last map photographed and file it in evidence as Plaintiff's Exhibit K-8. I think that can be done by tomorrow afternoon at the latest, or by Thursday morning, certainly. I cannot retain the book—at least I would not ask the library to let us have it, because it is a very valuable record.

The Court: I suppose they will make no objection to your taking a photograph of that.

(Testimony of Paul A. Smith.)

Miss Phillips: No, your Honor.

Q. Lieutenant Smith, referring to Exhibits 6 and 7, by Ringgold, showing the Mare Island area, the original charts are on file in the Coast & Geodetic Survey office?

A. K-6 and 7 were the charts that were so certified, yes.

Q. I will ask you, Lieutenant Smith, to place these two maps on the wall board; what can you say as to the appearance of accuracy in the two charts by Ringgold which we have offered in evidence as part of Exhibits K?

A. They appear to be accurately construct- [48] ed charts and show evidence of careful work, as well as evidence of field work, that is, surveys; they took soundings. He also states in his introductory that he used triangulation control, based on a base in the vicinity of Vallejo, and further south as a base of verification in San Francisco Bay. That does not show in these charts, however.

Q. What is the significance of triangulation control?

A. That is the framework control for all topographic and hydrographic surveys that gives it a foundation of accuracy. It is used entirely by the Coast & Geodetic Survey to control all of their surveys.

Q. Just remember, Lieutenant Smith, that most of us are not Coast & Geodetic Survey habitues and most of us have never indulged in survey work. Can

(Testimony of Paul A. Smith.)

you explain a little further what you mean when you say that the triangulation control was established?

A. It means that he measured a base line accurately with a tape along some flat ground, and at the ends of that base line which he measured he started observing triangles by angular methods over a system of intervisible points placed around the bay, and those points he used to control his subsequent work.

Q. What would you say as to the amount of detail shown on Ringgold's sheets as compared with the earlier charts we have offered in evidence today, Exhibits K and Exhibits J?

A. There is more detail shown, and the scale is larger than any of the others, especially of the one of San Pablo Bay, which shows more detail, both in the soundings and the type of the shore line.

Q. Do the latitude and longitude appear in any of the earlier charts, as you recall?

A. I am not sure. I think it does appear in the legend. I cannot recall that now, however.

Q. Does Ringgold show the latitude and longitude?

A. Yes, Ringgold shows the latitude and longitude. [49]

Q. Does he show any compass variations?

A. Yes, on this chart of San Pablo Bay he gives the variations. He also gives a note showing that

(Testimony of Paul A. Smith.)

he had reduced his soundings to the lowest water.

Q. Are there any low water lines shown?

A. There are several depth curves, but I do not believe that he shows a low water line.

Q. In any part of the harbor does he show low water lines—I don't mean just in the Mare Island area, I mean anywhere, as an indication of the accuracy or the amount of detail which he attempted to represent?

A. He shows a number of those depth curves that apparently are delineated in considerable detail by the soundings. There is no doubt about that. He has sounded out right around the depth curves. I don't find anything that can be definitely identified as a low water line.

Q. Does he show any sailing ranges?

A. Yes, he shows a number of those, particularly in this sheet of San Pablo Bay.

Q. And in the entrance to the Golden Gate?

A. Yes.

Q. The sailing ranges were to clear navigational dangers, I presume? A. That is right.

Q. Do you know anything about the subsequent use of Ringgold's sailing ranges?

A. I don't understand your question.

Q. Is it a fact that the sailing range established by Ringgold on his chart of the entrance to San Francisco Bay was the sailing range used by mariners until about two years ago, until the erection of the Golden Gate Bridge?

(Testimony of Paul A. Smith.)

A. I believe it was the entering range to the Golden Gate, the natural range.

Q. Does Mare Island appear on either of the two exhibits, Exhibits K-6 and K-7?

A. These are K-6 and K-7 are they?

Q. Yes. A. And San Pablo Bay is K-6?

Q. I think it is the other way. The entrance to the Golden Gate is K-6, and San Pablo Bay is K-7.

A. Now what was [50] your question again, please?

Q. Is Mare Island represented on either of those maps? A. Yes.

Q. Will you point it out to the Court?

A. On the general chart it is shown in the northeastern part of San Pablo Bay; it is quite obvious on the San Pablo Bay chart.

Q. What appears to be the water boundaries of the Island as shown on those two charts?

A. On the general chart, the water boundaries are Napa Creek to the northeastward, San Pablo Bay to the southwestward. The stream of water bounding the northwestern part of the island is labeled Sonoma Creek at its mouth, but no other name is given in the upper reaches. The same names are shown on the larger scale chart.

Q. Does there appear to be any waterway crossing Mare Island from Mare Island Straits to San Pablo Bay? A. No.

Q. I mean other than the boundary you have referred to as being up there toward Sonoma Creek and Napa River. A. No, there is none.

(Testimony of Paul A. Smith.)

Q. Do there appear to be any sloughs the entrances to which or any part of which appear on either chart?

A. There are two sloughs entering into Napa Creek that are shown extending only a short distance back into the Island, to the limits of what apparently was the limit of his investigation.

Q. I cannot see it from here, Lieutenant, but do there appear to be soundings going up into either of those areas, Sonoma Creek or Napa River?

A. There are soundings in Mare Island Straits, in what he labels Napa Creek; the last sounding is about where the pointer is now.

Q. That would be approximately one-third of the distance toward the extreme end of Napa Creek, would it, as shown on the map?

A. That is right.

Q. And on the Sonoma Creek side, do there appear to be any soundings there?

A. Yes, he has a few soundings in Sonoma Creek, but none [51] in the other water course that goes over across the northwesterly extremity of the island.

Q. Do you know who were any of the officers associated with Ringgold in the preparation of his charts?

A. The title states Lieutenant Blunt.

Q. You have mentioned Stuart. Was that the Stuart with the Wilkes expedition?

A. That is right.

(Testimony of Paul A. Smith.)

Q. Can you identify the chart which I now hand you?

A. This is a photographic copy of the hydrographic survey of Mare Island Straits made under the direction of A. D. Bache, Superintendent of the Coast Survey, and it states in the title the triangulation was done by J. S. Williams, assistant of the Coast Survey, and S. F. Blunt, Lieutenant of the United States Navy. The hydrography was done by a party under command of William P. McArthur.

Q. What is the date of this survey?

A. The date of this survey in 1849.

Q. Let me understand and be sure I have it right. Is there any prior work of the Coast & Geodetic Survey in this district, I mean of the whole San Francisco area, prior to this chart?

A. Not to my knowledge.

Q. This is then the first work of the Coast & Geodetic Survey in this district, that you have been able to find? A. Yes.

Miss Phillips: Q. Mr. Smith, can you state what the methods of the Coast Survey are that are used in preparing a survey such as this?

A. Yes. This is what we call a hydrographic survey. It means a survey of the under water area, the bottom of the stream, and the soundings are located by angular observations taken from signals or signs that are erected on shore and controlled by such necessary shore work for that purpose.

(Testimony of Paul A. Smith.)

Q. Are the soundings taken right through the day, from daylight [52] to dark? A. Yes.

Q. In making a survey such as that?

A. Yes, they are.

Q. How do you reduce your soundings to a common level, considering that the tide is ebbing and flowing, or if there may be a flowing and ebbing of the tide in the period the observations are being made?

A. There is, of course, a natural change of tide, and it is taken into account by observations during the time of the survey on the tide staff, in this particular case on a tide staff, and at the present time the use of automatic tide gages, which give complete records of the stage or height of the tide.

Q. Let us make sure that we understand you. You mean a party such as one making hydrographic soundings in a particular area erects a staff and the tide, the height of the water is measured on that staff throughout the day?

A. It is observed at frequent intervals, sometimes as often as every ten minutes.

Q. And then at the end of the day how do you utilize the observations on the tide staff?

A. Those observations are applied to the sounding records to reduce those soundings to whatever datum plane was used in the survey.

Q. How do they select the datum plane?

A. The datum plane is selected by analysis of the tides; in the case of the Pacific Coast it is a

(Testimony of Paul A. Smith,)

plane of mean lower low water—those are two words, lower low water. This particular survey, however, was reduced to the plane of mean low water, as stated in the title, and the subsequent note reads, "Subtract one foot from the soundings to reduce them to the approximate plane of mean lower low water," which is consistent with what we know of the tides in this region today, that is the difference today by the best observations which we have between mean low water and mean lower low water is one foot. [53]

Q. That is the experience over a long period of years that there is that difference of a foot between mean lower low water and mean low water?

A. Yes, we know that.

Q. So, then, the hydrographic soundings are taken and are reduced to a common datum plane through the observations of the tidal heights or the heights of water right through the day at frequent intervals and based upon an observation of what is the height at mean lower water at the time of that observation: is that correct? A. Yes.

Q. What is the primary purpose of a survey such as that, Mr. Smith?

A. The purpose of a hydrographic survey of this nature is to show the details of the channel, the bottom of the channel, for the purpose of navigation and harbor facilities for vessels.

Q. And for safe navigation?

A. That is right.

(Testimony of Paul A. Smith.)

Q. Let me direct your attention now to the continuous black line which begins here at the right hand side of the page and proceeds upward on one side of Napa Straits and on the left hand side upward in a northwesterly direction. What does that continuous black line indicate?

A. That is the shore line.

Q. In the Coast Survey method how is the shore line ascertained?

A. The shore line is determined by topographical methods, as a rule. This particular sheet is a hydrographic survey and was probably not determined by topographical methods, although we have no evidence to state that it was not, but I cannot say that the shore line on this particular chart was based on a topographical survey. It was merely determined by the hydrographer and probably from any observations on the shore line to his point on the opposite side.

Q. What are the dotted lines that are along through Mare Island Straits at varying distances from the continuous black line?

A. Those are the depth curves; the dotted lines seaward from the [54] shore line are the depth curves; the first one seaward is the 1 fathom curve, the second the 2 fathom curve, and the third the 3 fathom curve; that is the depth below mean low water as shown on that survey.

Q. That is depth below mean low water is shown on this survey? A. Yes.

Q. What is the meaning of the break in the con-

(Testimony of Paul A. Smith.)

tinuous black line and in the fathom line on the upper end of the map, and similarly at the lower end of the map?

A. That is the limit of the survey; the survey was not carried further than that.

Miss Phillips: I will offer this in evidence as Exhibit L-1. I am marking the Coast Survey chart under a common letter.

(The chart was marked "U. S. Exhibit L-1.") (Set forth in Vol. IV, page 10 of this printed Transcript of Record.)

Q. Mr. Smith, was this survey based on triangulation control?

A. The hydrographic survey of 1849?

Q. Yes.

A. I think that it was, I am not sure.

Q. Are you able to tell from the face of the chart whether or not it was based on triangulation control?

A. He has a number of small triangles shown around there, and that probably was his triangulation control.

Q. Before leaving our discussion of Exhibit L-1, counsel a few days ago asked me if I could state or would state that Exhibit L-1 was submitted and was used with the Smith Board of 1860. I think that is the hydrograph of McArthur that we discussed, was it not?

Mr. Lipman: That is correct, and what I wanted stated was that the report referred to a map that

(Testimony of Paul A. Smith.)

McArthur furnished the board, and this was the map they were talking about.

Miss Phillips: Yes, I think that is undoubtedly correct. I have correspondence showing that McArthur submitted it to the Board and they utilized it probably before it was even printed; [55] it is probable the original data and original drawings were submitted to Colonel Smith at that time.

Q. Mr. Smith, I now show you a chart and ask you if you can identify this exhibit.

A. This is a photographic copy of the topographic survey by R. D. Cutts, and is known as Register No. 316 in the Coast and Geodetic Surveys, a survey of Mare Island and the Straits of Carquinez, California, in 1851.

Q. This is a sheet from the original survey?

A. This is a photographic copy of the original survey.

Q. What is the date of the survey?

A. 1851.

Q. You have stated this is a topographical survey. Will you direct the Court's attention to the difference between a topographic survey and its method and a hydrographic survey?

A. A topographic survey is a survey which is made to show the features of the land above the water and a hydrographic survey is made to map the bottom of the ocean or bottom of the water way.

Q. Was this topographic survey of 1851 based upon a fundamental control? A. Yes.

Q. What was the nature of it?

(Testimony of Paul A. Smith.)

A. This was based on triangulation.

Q. I show you two photostats and ask you if those are the copies of the triangulation controls upon which the topographic survey was based?

A. Yes, these photographs were taken from the reports of 1850 and 1852, and show the progress of the triangulations that were being carried on at that time.

Q. Now, who was the officer in charge of this topographic survey of 1851?

A. R. D. Cutts was the assistant of the Coast & Geodetic Survey.

Q. Who were the officers assisting him?

A. I do not recall the officers with him at that time.

Q. Is there anything on the map to show who assisted him?

A. The only names appearing on this are A. D. Bache, who was [56] at that time superintendent, and signed by R. D. Cutts, who made the survey.

Miss Phillips: I think perhaps I will offer in evidence the Cutts topographic survey as Exhibit L-2 and ask that it be marked, and the triangulation controls on which this topographic survey is based as Exhibits L-3 and L-4.

(The documents were marked U. S. Exhibits L-2, L-3, and L-4.) (U. S. Exhibit L-2 is set forth in Vol. IV, page 11 of this printed Transcript of Record; U. S. Exhibits L-3 and L-4 are omitted by designation from this printed Transcript of Record.)

(Testimony of Paul A. Smith.)

Q. Now, as I understand you, this is an actual survey sheet, is it?

A. This is a photographic copy of the actual survey sheet.

Q. A photograph of the actual survey sheet?

A. The sheet on which he made that survey was right on the ground when he made it, that is the plane table method.

Q. The plane table method? A. Yes.

Q. Will you explain to the Court what is the plane table method of making a survey?

A. The sheet on which the survey is made is taken into the field and placed on a portable table on a tripod and observations are made with an instrument called an alidade, which is pointed at the different points that he wishes to depict on his sheet, and the features that are shown on that sheet are placed on the sheet as the topographer looks at them.

Q. And he actually records them while on the field?

A. He actually makes this plate while he looks at the features.

Q. What is the continuous heavy line which I am now pointing to, pointing now from the southward—— A. You can orient yourself.

Q. Carquinez straits is toward the bottom of the map, San Pablo Bay would be on the left, and Mare Island Straits on the right: is that correct?

(Testimony of Paul A. Smith.)

A. That is right.

Q. What would the continuous heavy line represent or indicate on there? Let us take both sides of Mare Island Straits, what is the continuous line?

A. That is the shore line which has always been the closest practical approximation to mean high [57] water line.

Q. That is the shore line as determined by the topographic engineer on the ground?

A. That is right.

Q. What is the line of dots, the continuous dotted lines seaward from the continuous heavy line which we see, for instance, on both sides of the straits out from the site of the mainland, Vallejo, for example, and on the San Pablo side from Mare Island? A. That is the low water line.

Q. Can you measure now in court and give us an idea of the distance between the line of low water and the shore line or line of mean high water as you have given it on that map? Let us take it at what we might call the neck of land on the upper part of the map

A. I would have to have a pair of dividers. I think I have them in that note-book. Will you please give me the dividers and the metric scale. This survey is made on the metric system and it is necessary to scale it on the same system upon which it is made. This should be put on a flat surface. It is impossible to scale it unless you do. I can scale this at any place that you wish.

(Testimony of Paul A. Smith.)

Q. I ask you to scale it at the top of the narrow neck of land. By the way, what does that continuous black line which you have identified as the shore line representing mean high water? Why does that break at that point?

A. That is the limit of the survey, that is as far as he carried his work.

Q. Now, I would like to have you measure it at that distance. Let us measure first the distance from the shore line to the low water line on both sides of that neck of land and let us have it reduced to feet.

A. There is a conversion table in my note book which I ought to have. It would be a lot easier to reduce it to feet by this table. Just give me that note book and I will get it. The distance from Napa Creek shore line [58] to the low water line as shown on the survey is 330 meters.

Q. I think it might be well for you to mark the points that you are now measuring A and B. The shore line can be marked A.

A. This point is called A.

Q. And the point on the low water line which you have measured B? A. Yes.

Q. And the distance between those two is what?

A. 330 meters, and 330 meters is 1082.7 feet, according to the Bureau of Standards conversion table for that purpose, which is also used by the Coast & Geodetic Survey.

(Testimony of Paul A. Smith.)

Q. Now, let us measure the distance on the San Pablo side of the narrow neck of land from the shore line, marking that C, and the low water line directly out from that, marking that D.

A. The distance from C to D is 420 meters, and according to the Bureau of Standards conversion table 420 meters is 1377.95 feet.

Q. Now, what is the distance between A and C, that would be the distance between the two points of the shore line from which you have measured outward on both sides.

A. The distance between A and C scales 150 meters, and 150 meters is 524.9 feet.

Q. Is there any indication of a stream of water crossing Mare Island at any point shown in this survey? A. There is not.

Q. Mr. Smith, I think perhaps it might be better to lift that map up so that we can see the points of land on the map to which you are now referring. Will you explain to the Court the various symbols appearing on the map, taking for instance the curved lines toward the bottom half of the representation of the island?

A. These continuous curved lines in this southeastern part of the area are contours which are lines of equal [59] elevation.

Q. Would that show barely the elevation through this part of the map?

A. Yes, this is irregular topography, what we call irregular topography.

(Testimony of Paul A. Smith.)

Q. What are the horizontal lines shown on the Mare Island Straits side appearing about three-fifths of the map on the Mare Island side? You see what I am pointing to?

A. You mean the Mare Island Straits?

Q. On the Mare Island Straits side.

A. The area that you have just indicated shown by finely spaced parallel lines is marsh.

Q. The hachures to which I am now pointing, these circular affairs up toward the top of the map, still on the Mare Island Straits side, are what?

A. That is another method that is used to indicate differences of elevation.

Q. Can you tell us what the curved line continuous, rather faintly drawn outward toward the middle, outward from the horizontal lines indicating marsh, just beneath the name Mare Island, indicates?

A. That is the contour line, a line of equal elevation.

Q. A similar curved line crossing and going into the hachure, what does that indicate?

A. That feature is a small hill. The hachure, as you call it, was used to indicate the shape of the hill, and the line running out from that is the line of equal elevation.

Q. What are the straight lines running north vertically to the map which are above the lines you refer to?

A. To the northwestward of the last line?

(Testimony of Paul A. Smith.)

Q. Yes.

A. Those are also hachures showing the slope of land toward the marsh.

Q. What is the little circular spot, the white spot in these [60] horizontal lines—by the way, the horizontal lines lying next above the contour lines are what?

A. Those finely-spaced parallel lines is a symbol representing marsh, and the feature that you just indicated in the clear white area without any of those finely-spaced lines is a pond.

Q. And the dot within the pond?

A. That is a small island within the pond marked "Island" as shown by the characteristic symbol.

Q. Does the scale appear on this?

A. Yes, the scale is marked 1 to 10,000.

Q. What is the exhibit which I now hand you?

A. This is a Coast Survey chart of Mare Island Straits, California, published in 1851, on a scale of 1 to 30,000. It is an actual print from a copper plate in the archives of the Coast & Geodetic Survey.

Q. That, as distinguished from the previous exhibit—the exhibit which you are now holding is a published chart? A. That is right.

Q. Whereas the preceding one was an actual survey?

A. I should state that this chart is compiled from the original surveys we have just looked at.

Q. That is what my next question was going to be. A. Yes.

(Testimony of Paul A. Smith.)

Miss Phillips: May I have this chart of 1851 marked our Exhibit next in order?

(The chart was marked "U. S. Exhibit L-5.") (Set forth in Vol. IV, page 12, of this printed Transcript of Record.)

Q. Now, handing you Exhibit L-5, upon what is Exhibit L-5, the published chart of 1851, based?

A. As I have said, it is based on previous surveys which have been introduced; it so states in the title.

Q. Well, let us make it specific. It is based on the topographic survey which has just preceded this exhibit and is marked Exhibit L-4?

A. Yes, by Cutts. [61]

Q. On what hydrographic survey is it based?

A. On the survey of 1849, by McArthur.

Q. Then this chart combines the two earlier surveys and makes a published chart for the use of the public? A. Yes.

Mr. Lipman: I think that should be L-2.

Miss Phillips: We will straighten that out.

Q. Will you state what officers combined to make the published chart, the chart of 1851?

A. The title gives that information. "U. S. Coast Survey Mare Island Straits, California. Triangulation by J. S. Williams and R. D. Cutts, and Lieutenant S. F. Blunt, U.S.N., Joint Commission Army and Navy Officers. Topography by R. D. Cutts, Assistant U. S. C. S. Hydrography by the

(Testimony of Paul A. Smith.)

party under the command of W. P. McArthur, Lieutenant U. S. N., and Assistant U. S. C. S. Scale 1 to 30,000. 1851."

Q. Can you identify the two charts which I now hand you?

A. The first is United States Coast Survey, Topographic Survey of San Francisco Bay, California, plane table sheet XXII on scale of 1 to 10,000; it was made by Rogers in 1856.

Q. And the second sheet?

A. The second sheet is a similar survey by Rogers in 1856 labeled "Plane table sheet No. XXII, scale 1 to 10,000, of the land continuing on northwestward of plane table sheet No. XXII."

Q. This last chart, then, is a chart made by the plane table method, is it?

A. Both of these are made by the plane table method.

Q. And I think your previous testimony has explained what the plane table method was?

A. Yes.

Miss Phillips: May I have these two charts introduced in evidence as Exhibits L-6 and L-7?

(The charts were marked, respectively U. S. Exhibits L-6 and L-7.) (U. S. Exhibit L-6 is set forth in Vol. IV, page 13 of this printed Transcript of Record; U. S. Exhibit L-7 is omitted, by designation, from this printed Transcript of Record.)

(Testimony of Paul A. Smith.)

Mr. Lipman has directed my attention to the possibility of a [62] misunderstanding of the record. The last published chart of 1851 is based upon the hydrographic survey by McArthur in 1849, the topographic survey by Cutts in 1850, or 1851, and on the two sketches of triangulation control offered in evidence.

Q. That is correct, is it, Mr. Smith?

A. That is what is stated in the title, but the sketches show the progress of the triangulation. That is not necessarily the triangulation as it existed; it was the progress triangulation submitted to our office by the parties in the field.

Q. You have identified these sheets as copies of Rogers' topographic survey of 1856; will you tell the Court who Rogers was?

A. Rogers was an officer in the Coast & Geodetic Survey engaged at this time on topographic surveys of this region.

Q. Do you know what his standing as a surveyor was in your service?

A. Yes, he was regarded as one of the best topographers that the Coast Survey had.

Q. Now, referring to the first sheet and the lower part of this survey, what does the continuous black line represent upon the map as we see it? For example, take the side of the land toward Mare Island, or take it toward San Pablo Bay, starting from the lowest point of the map and proceeding

(Testimony of Paul A. Smith.)

upward, up as far as there is a break in the line, what does that line represent?

A. The line to which you just pointed along the southeastern side of the land area bordering San Pablo Bay is a shore line. As I stated before, that has always been the closest practical approximation to the mean high water line.

Q. Now, taking it the same way on the Mare Island Straits side, the continuous line represents the shore line, does it—the continuous black line represents the shore line?

A. That is right.

Q. What does the dotted line represent seaward from this con- [63] tinuous shore line?

A. That is the low water line.

Q. I think I would like to have you measure again upon the survey of 1856 the distance between the low water line, the shore line—the shore line and the low water line again. Let us take that at two different points. I will ask you to measure it at approximately the same position on which you measured it in the preceding exhibit, the neck of land, taking it as nearly as you can determine it. Take it as nearly as you can from the point where you took the other measurement.

A. I can take it exactly if I refer to the other exhibit.

Q. I wish you would do that for we might as well have it exact..

A. I will mark these in blue pencil.

(Testimony of Paul A. Smith.)

Q. Yes, mark the first line A-B, and then C-D, as you did before, and then read out the distances.

A. I am marking the point on the northeast side of this shore line A and the point on the low water line toward Napa Creek B. The point on the shore line on the San Pablo Bay side C, and the point on the low water line on the San Pablo Bay side D, the same as I marked them on the Cutts map. The distance from A to B scales 310 meters, which, on conversion according to the Bureau of Standards tables is 1017.0 feet. From the point C to the point D scales 430 meters, which by conversion according to the Bureau of Standards tables is 1410.7 feet.

Q. And the distance from A to C is what—that is the neck of land, itself.

A. 140 meters; 459.3 feet.

Q. Now, I would like to have you measure similarly at a point let us say from the entrance of the first slough shown on the map, or just southward of that.

A. You mean the one that is labeled "Boat cut-off"?

Q. Yes, make a similar measurement there, both of the land between the low water line and the shore on both sides. [64]

A. Will I pick the widest part?

Q. Yes, pick the widest part.

A. I will label the point on the boat cut-off side A.

(Testimony of Paul A. Smith.)

Q. Measure it the same way, A-B on the Mare Island side, and C-D on the San Pablo side, making just the same measurements.

A. I suggest we use different letters to avoid confusion.

Q. Yes, let us use W, X, Y and Z. Thank you for the suggestion. I suggest that you take a point just below the boat cut-off.

A. You ask that the point be just below the boat cut-off; the point we have selected is right at the mouth of the boat cut-off, where it empties into Napa Creek.

Mr. Olney: May I ask counsel what the relevancy of all these measurements between low tide and high tide lines is in connection with this case? I confess I cannot see any.

Miss Phillips: Well, I think I do. I think sometimes these measurements, your Honor, when we are talking about tide lands and the flow of tides, are quite important. I think——

Mr. Olney: If there is no definite answer to my question you might proceed.

Miss Phillips: Now, let us not both talk at once, Judge Olney. You asked me a question and I am answering you, or am trying to answer you. I think it is of benefit to have in the record exact computations upon some of these things. It saves doing it ourselves. In some respects it is useful to have an exact computation.

(Testimony of Paul A. Smith.)

Mr. Olney: Your Honor, I cannot see that the exact computations here have any bearing on any question that is involved in this case. I do not intend to object except that it is using up the time of the court and of counsel.

The Court: I suppose you will make that clear hereafter, Miss Phillips? [65]

Miss Phillips: I am not sure to what extent it will be relevant. I can see that the expanse of tide lands, or of lands between a shore line and a low water line, would be relevant and will be considered relevant in the case. However, we have it at one place in the record. I withdraw the last question.

The Court: There is no objection, as has been stated by Judge Olney. He was just asking the question what relevancy it has to the case, here.

Miss Phillips: I am not altogether sure. I find myself, in view of counsel's statement this morning as to what extent Mexican law governed, thinking that computations of this kind will be valuable. However, they can be made from the exhibits themselves so I will not proceed further along this line.

Q. Now, let us take the first sheet of the Rogers survey. Is it possible to say how the land lay, that is, what the general direction of the slope of the land was, is it possible to say that from that chart? A. The slope of the land in the region on which contours have been placed gives us the exact configuration.

(Testimony of Paul A. Smith.)

The Court: Q. What are you pointing to?

A. To the southeastern section of this survey.

Q. Mare Island? A. That is right.

Miss Phillips: Q. The part which you have already explained, I think, in previous testimony—the contour lines down here: is that correct?

A. That is right.

Q. Looking at the upper part of the exhibit, northeasterly, is it possible to say what is the lay of the land in this region northward of the isthmus?

A. There are no elevations shown on this region of the survey northeastward of the isthmus, but there are streams shown flowing into the boat cut-off, and from that we can infer that the drainage is toward Napa Creek. [66]

Q. Are there any sloughs, or small drainage canals, we might call them, which drain in the opposite direction, that is, from Napa Creek toward San Pablo Bay?

A. There are, of course, on the northeastern side of boat cut-off that drain toward San Pablo Bay. On this piece of land between boat cut-off and San Pablo Bay the streams all widen toward the northeastward, which indicates drainage toward the northeastward.

Q. Take the drainage system between boat cut-off and San Pablo Bay, is there anything to indicate a drainage system draining from the sloughs into San Pablo Bay? A. No, there is not.

(Testimony of Paul A. Smith.)

Q. Is the drainage in the reverse direction, toward Napa? A. I should say that it is.

Q. What are these horizontal lines, the fine horizontal lines crossing from side to side throughout this area in the boat cut-off region, in the Navy Yard Slough region, etc., represent?

A. That is the symbol used for marsh or meadow.

Q. What are these white spots within the horizontal lines that appear at different points on the survey? A. Those are ponds.

Q. There are perhaps half a dozen of them, more or less? A. Yes, those are ponds.

Q. Is that the symbol used by the survey office to indicate a pond?

A. Yes, not only by the Coast Survey, but by any topographic mapping agency.

Q. Mr. Smith, I observe on this map names to two sloughs, Boat Cut-off and Navy Yard Slough; do you recall seeing those names on any earlier maps?

A. No, I believe this is the first time that those names appear.

Q. Does this map show a beach line? Is there anything to indicate a beach or sandy beach along the shore?

A. There is nothing on the general map to indicate a beach line along the shore. [67]

Q. Are you familiar with the Mare Island area, itself?

(Testimony of Paul A. Smith.)

A. I was over it last week for the first time.

Q. You tramped over various parts of the island and in the marsh land area? A. Yes.

Q. Did you find any remnants of sand ridges or sand dunes, or sand beaches?

A. Yes, there was one definite indication of an old sand beach on the southwestern side of the island.

Q. Can you pick it out on Exhibit I, the aeroplane map? And, by the way, let us orient ourselves on this map. You find the steam engineering building, do you not? A. Yes.

Q. And the steam engineering building appears at what point in Rogers' Survey? Can you pick it out on that map?

A. Yes, the building shows in here.

Q. A square building?

A. Yes. It should be mentioned that that is a projected line.

Q. That is a projected line? A. Yes.

Q. The steam engineering building you find is approximately at that place?

A. It is approximately in that location, yes.

Q. Can you locate the approximate place of that building on Exhibit I, which is the aeroplane map?

A. That building appears here. It shows plainly in the photograph.

Q. It is the same shape as in the projected building in 1856? A. Yes.

Q. Suppose we mark here on this map that

(Testimony of Paul A. Smith.)

point; mark it with an "X". Can you state to the Court where you found the remnants of sand beach or sand dunes?

A. The old sand ridge that appears very plainly in a cultivated field shows right on this photograph. We picked up some sand from that particular region. In the place where I stood the section of that beach which I inspected was at this point.

Q. The witness is now pointing in a northwesterly direction from [68] the steam engineering building appearing as a white blotch on the map. Let us have that distance measured. We will mark the distance as representing the remnants of a sand beach.

A. You want that distance measured from where?

Q. From the steam engineering building.

A. From the northwestern extremity of what I take to be the steam engineering building to the point that you have just indicated measures, according to the scale that is shown on the map, 6400 feet, approximately.

The Court: Q. In what direction?

A. Northwestward.

Q. How far from the shore line?

A. From the San Pablo Bay shore line, sir?

Q. Yes, the nearest shore line.

Miss Phillips: That would be the present shore line.

A. It shows, from the shore line as shown on the

(Testimony of Paul A. Smith.)

photograph, approximately 1800 feet.

The Court: Q. How large is that patch of sand that you saw?

A. It is a ridge running parallel to the shore line. As nearly as I can recall, it is about between 10 and 15 yards in width. That is very definitely sandy.

Miss Phillips: Q. How far did you follow that ridge? You have given the width of it, how far did you follow it in length?

A. I didn't walk along it at all. You can see it running across the field.

The Court: Q. What would that indicate to your mind?

A. It indicates that there was a very definite sand ridge there at some prior time, undoubtedly a storm water line that formed behind a beach.

Miss Phillips: Q. Did you find an escarpment there?

A. There is none there now. It has been cultivated. [69]

Q. What is the chart that I now hand you, Mr. Smith?

The Court: Q. Will you please point out on that photographic map where the land that has been surveyed under 569 is?

Miss Phillips: I don't believe the witness can do that, your Honor. I think the land in controversy could be roughly described—and perhaps counsel can correct me on this if they do not agree

(Testimony of Paul A. Smith.)

with me—as starting from the point that appears on the map as a "V" and proceeding northward the rest of the expanse up to the waterway here. I ask counsel to correct me if I am wrong. I am saying, in response to the Court's question, that I understand the land in controversy to be the land from a line appearing here as a specie of a "V" and then proceeding northward from that. There appears to be something here in the shape of a "V". Is that approximately correct, Counsel?

Mr. Lipman: That is approximately correct, your Honor.

Mr. Olney: Only approximately, I think.

Miss Phillips: Either side can put in a map showing it.

The Court: I just wished an approximation.

Miss Phillips: That is what I understood, your Honor, and that is why I stated it to the best of my ability.

Q. Now, Mr. Smith, what is the chart that I have just shown you?

A. This is a chart of Mare Island Straits, California, published by the Coast & Geodetic Survey in 1859, on a scale of 1 to 30,000. This sheet is a print from an engraved copper plate on file in the archives of the Coast & Geodetic Survey.

Q. That is a published chart of 1859?

A. That is right.

Q. Upon what surveys was that chart based?

(Testimony of Paul A. Smith.)

A. It states in the title, "Triangulation by R. D. Cutts; Topography by R. D. Cutts and A. F. Rogers. Hydrography by the party under command of James Alden."

Q. On the survey by Rogers in 185[illegible] and the hydrographic survey [70] by Alden in what year?

A. The hydrographic survey by Alden was also in 1856, I believe. It is stated on the survey.

Q. Is this a copy of Alden's hydrographic survey of Mare Island Straits which I have now handed to you? A. Yes.

Miss Phillips: Now we will put in the hydrographic survey of 1856. Alden immediately followed Rogers with the chart which utilized the two surveys of 1856. We offer that as our next exhibit.

(The survey was marked "U. S. Exhibit L-8.") (Set forth in Vol. IV, page 14, of this printed Transcript of Record.)

Q. Who was Alden?

A. Alden was a commander in the United States Navy, and was assigned to Coast and Geodetic Survey work.

Q. Do you know what his reputation was as a hydrographer? A. Yes, it was very good.

Q. Was this survey made under specifications of the Coast & Geodetic Survey? A. It was.

Q. What is the continuous black line shown under depth soundings here following along Napa Straits on both sides?

(Testimony of Paul A. Smith.)

A. You are pointing to the shore line?

Q. Yes.

A. The continuous black irregular line is the shore line.

Q. And the first dotted line, and from that on, is what?

A. The first dotted line is the low water line. In this case it is the mean lower low water line.

Q. What is the first dotted line outward from the mean lower low?

A. That is the one fathom depth, all points of which are one fathom below the plane of mean lower low water.

Q. And the next dotted line from that would be what?

A. The two fathom depth curve. And the third would be the three fathom.

Q. What does the break in the shore line on the San Pablo side here at the furthermost corner of the map on the left represent?

A. At the northwestern extremity of the survey the break is the [71] end of the survey, it was not continued further.

Q. This was done according to specifications of the Coast Survey? A. Yes.

Q. Were the prior charts and surveys which have been introduced in evidence made pursuant to Coast Survey specifications?

A. Those of the Coast & Geodetic Survey were, yes.

(Testimony of Paul A. Smith.)

Miss Phillips: The published chart of 1859 we offer as our next exhibit. I believe that will be L-9.

(The chart was marked "U. S. Exhibit L-9.") (Set forth in Vol. IV, page 15, of this printed Transcript of Record.)

Q. Now, Mr. Smith, I would like to ask you, in studying the chart of 1849, whether or not a measurement of the same point on this chart at the neck of land at which you measured on two prior charts, whether or not the fact that this one utilized lower low water would enable you to make a comparison between the measurements to be shown on this chart of that area with the others, or whether that fact makes it difficult for you to make a comparison?

A. The comparison that you ask for I take it is between the mean lower low water line and the mean low water line of that 1849 survey?

Q. Yes. A. The comparison can be made.

Q. I would like to have it made.

A. But that will require some time.

Q. Very well, we will let ~~that wait until~~ later on in the case and I will question you further on that. I think there are a number of symbols that appear on that chart that I would like to have you explain to the Court. I am referring to Exhibit L-9. Suppose you put this chart on the table here so that his Honor can see it, because it is not drawn on a large scale.

(Testimony of Paul A. Smith.)

The Court: I am wondering how this evidence will aid the Court.

Miss Phillips: We are showing as nearly as can be the Island. [72] You cannot have an island without having a water boundary. There is nobody alive today that can tell you or can testify in court what was the island there. The best evidence of that island is the record of the men who were on it in one capacity or another, and who were officially sent out to measure it and survey it.

The Court: Is it denied that Mare Island is an island?

Mr. Lipman: We do not deny that Mare Island is an island. We deny that the lands up to 569 ever were known as part of Mare Island, even in the old days, or that they were part of the island.

Miss Phillips: They deny that they are physically a part of the island, so, therefore, proof of what is the island becomes necessary.

The Court: Mr. Lipman stated that one of the pivotal questions to be decided was what is Mare Island, when he made his opening statement. I am wondering just how all of this evidence will aid the court to decide this case. As I understand it, you are going to depend mainly upon your third defense?

Mr. Lipman: I would not say mainly. I consider our third defense absolutely conclusive, and if that defense could be decided first, if it were de-

(Testimony of Paul A. Smith.)

cided in favor of the defendants we would be content to stand on that decision without going into the other defenses, but we also have other points that we rely on. Obviously, if our third defense is good all of the other defenses are wholly immaterial.

Miss Phillips: Is counsel willing to stand on the third defense?

Mr. Lipman: If it is decided in our favor we surely are.

Miss Phillips: That is not an answer. I am asking are you willing to stand on the third defense and that defense only? [73]

Mr. Lipman: If decided in our favor we are. In other words, we consider that that defense, if decided in our favor, is strong enough that we can sustain it, but we are not going to waive our defenses to other claims which we think we are fully able to meet.

Miss Phillips: That is not an answer and we must go ahead.

The Court: That may be so, but the question in my mind is how important this evidence is.

Miss Phillips: I think that is for your Honor to determine.

The Court: All of these maps, all of these measurements, I am wondering how it will aid me in deciding the questions that are to be submitted to the Court.

(Testimony of Paul A. Smith.)

Mr. Lipman: It might be that the case could be shortened in some way, by permitting the Government to introduce all of its evidence that Miss Phillips wishes to introduce to establish what she believes to be her main case, and then let us proceed with our case, directed to the third defense.

The Court: There is no objection made to these maps, the introduction of these maps. At the beginning it was pointed out they had some historical value and perhaps they might have some evidentiary value.

Miss Phillips: That was the first group of maps, there was an objection made on the ground that they were old; it is not denied that they were old maps, but there was no proof offered to the Court of the specifications under which they were made. Their value might be quite slight. But the maps as we proceeded from that first group, which were offered as Exhibit J, we proceeded into the next group which we offered as K, they are maps showing on their face a survey and work done with evident accuracy, made by competent surveyors. Now, we are proceeding to the next group, which is marked L, showing a group of maps [74] made by the most competent map makers in the United States, a body of engineers and men whom the Circuit Court of Appeals in the case of United States v. Romaine, several years ago, held to be of the highest possible evidentiary value, and I think

(Testimony of Paul A. Smith.)

there can be no doubt of the authority on that question. I am questioning the witness, however, and arranging the maps in chronological order and asking for an interpretation on some of the symbols, some of the lines, to get the benefit of his scientific experience.

Mr. Olney: Of course, our theory in regard to this matter of Mare Island is what different people really believed it to be, what was accepted among people commonly as being Mare Island. I questioned the first batch of maps introduced because they threw no light upon that matter. They were crude, old maps, imperfect in detail, and threw no light upon the subject, whatever. These last maps that have been going in now I think do throw light upon it, and we made no objection to them. We think they should go in just as Miss Phillips has put them in. I do not see that the detail in regard to these measurements cuts any figure, whatever, but if Miss Phillips thinks it does we are not going to object to it.

Miss Phillips: Q. Mr. Smith, there are a number of symbols here on the map which I would like to have you explain to the Court. The term "hachures" has been used several times. Will you define "hachure" and point out to the Court the hachures and tell what the symbol means?

A. The hachures are characteristic symbols. What I am pointing to to illustrate the difference

(Testimony of Paul A. Smith.)

in elevation, here is a series of finely-shaded lines drawn down in the direction of the slope of varying width, and they would be at right angles approximately to contour lines which indicate lines of equal elevation. This gives a more [75] perfect picture of the relative difference in elevation, but does not indicate the exact elevation.

Q. It does indicate land of varying elevation?

A. That is right.

Q. What are the horizontal lines appearing to the north of the hachures—I will hand you a little magnifying glass to help you on that.

A. By horizontal lines you mean parallel lines toward Mare Island Straits side?

Q. Yes.

A. That to which I am pointing now is marsh.

Q. What are the horizontal lines appearing to the north of the hachures, what do those indicate, the little horizontal lines there?

A. Those are what we would call vertical lines, and that is used simply to represent the grass.

Q. What is the light area in here between the lines you have previously indicated as the shore line and the line indicated as the low water line?

A. That is sometimes used to represent sandy area, and also to represent the area between the mean low water line and the shore line. In this case that is what it represents.

Q. The continuous black line represents the shore line? A. Yes.

(Testimony of Paul A. Smith.)

Q. And the dotted lines outward from that, the first dotted line represents the low water line, and in this case it is lower lot water line?

A. Yes, the concentration of the fine dots represents the lower low water.

Q. And the area between represents what?

A. That would be the line between the shore and the mean low water line.

Mr. Olney: Q. In that case, where you say the shore line, you mean the line of mean high water, do you not?

A. The line of mean high water, yes.

Miss Phillips: Q. What does this part indicate as to the character of the land, northwesterly, all of this part in small horizontal lines?

A. That is marsh or meadow, according to [76] the symbol that is used for that purpose.

Q. And the small white areas that appear here and there are indications of ponds?

A. Of ponds.

Q. Is there any indication of a water course crossing the neck of land from Mare Island Straits to San Pablo Bay?

A. No, there is none.

Q. What is the first indication of any water course in the land of the Mare Island area?

A. Can you be more specific? Do you mean in the neck of land?

Q. No, you have just stated there is none in the neck of land. I will lead the witness here, if counsel

(Testimony of Paul A. Smith.)

has no objection. Boat cut-off is the first indication of any water course of any size at all?

A. It is the first wide inlet to Mare Island.

Q. And the drainage from that is in what direction?

A. I should say that the drainage is to the eastward, slightly southeast in this case.

Q. You mean the drainage from the north to the Boat Cut-off, and then southerly?

A. It cannot be said definitely that that drainage is in that direction. but the Boat Cut-off widens toward Mare Island Straits, therefore I infer the drainage is to the southeastward.

Q. Now, Mr. Smith, you say this is based on surveys of a hydrographer and topographer. What opportunity is there for correction of error of the one type of surveyor by the other?

A. When they are working together, in an area such as this, the topographer locates the shore line from his observation by a plane table method, which was described previously, and the hydrographer comes along with his boat, taking positions on signals or signs that have been erected along the shore or natural features that have been determined by the topographer, and if he comes inshore close to the shore line, as is done at high [77] tide and fixes his position on these signals, he will immediately detect any error that the topographer may have made.

(Testimony of Paul A. Smith.)

Q. In your experience in surveying, would you say that qualified topographers and hydrographers do correlate or correct their work if they find errors in the other? A. Yes, certainly.

Q. Is that part of their job to correct possible errors by other surveyors?

A. Yes, both of them are watching for anything of that sort.

Q. Can you identify the chart which I now hand you?

A. This is a Coast & Geodetic Survey of Petaluma and Napa Creek, California, published in 1861, on a scale of 1 to 30,000.

Q. What surveys were utilized in this chart?

A. The surveys that were utilized, as stated in the title, were triangulation by G. A. Fairfield and A. F. Rogers, Assistant in the Coast Survey, topography by A. F. Rogers, Assistant, and hydrography by a party by the name of James Alden, Commander in the United States Navy, Assistant.

Q. Does Mare Island appear on this chart?

A. Yes.

Q. What were the limits of this survey? It is supposed to represent a chart of Petaluma and Napa Creek?

A. Petaluma and Napa Creek.

Q. There is a little insert here, continuation of Napa Creek. At what point would you fit the insert into the chart?

(Testimony of Paul A. Smith.)

A. The insert marking the continuation of Napa Creek is merely an extension of the chart could it be shown at the southeastern extremity, and that could be matched up by projection lines of latitude and longitude for that purpose.

Miss Phillips: I offer this in evidence as Exhibit L-10.

(The chart was marked "U. S. Exhibit L-10.") (Set forth in Vol. IV, page 16 of this printed Transcript of Record)

Mr. Olney: Have you any other copy of this? We have no copy.

Miss Phillips: I do not think so. [78]

Q. Can you identify the chart which I now hand you?

A. I should like to be sure the record is correct about that chart that we just introduced previously. That is a photographic copy of a chart. Is that so stated?

Q. I am not sure, but you wish your testimony to show it is a photographic copy of the chart?

A. Yes. Now, this is a chart——

Q. (Interrupting) The exhibit you now hold in your hand?

A. Yes, printed from an engraved copper plate from the archives of the Coast & Geodetic Survey of San Pablo Bay, published in 1863, on a scale of 1 to 50,000.

Q. This chart utilized what surveys particularly?

(Testimony of Paul A. Smith.)

A. Triangulation by R. D. Cutts, G. A. Fairfield, G. Davidson, Assistant, and A. F. Rogers, Sub-Assistant, Topography by R. D. Cutts, Assistant and A. F. Rogers, Sub-Assistant. Hydrography by Commander James Alden.

Q. What have you to say as to the accuracy of the chart that you now hold in your hand?

A. Well, it was the most accurate thing available at that time.

Q. Would you say that the methods utilized at that time represented methods approved by the Coast Survey today? A. Certainly.

Q. Will you compare the shore line as shown in the chart of 1863 with the shore line as shown on the earlier charts?

A. Do you want a general estimate of that?

Q. Yes, generally.

A. It is apparently identical with this, although that could not be determined without an exact comparison.

Q. Is there any evidence of interference with natural conditions on the chart, itself, so far as the chart shows?

A. In the vicinity of Mare Island?

Q. Yes, in the Mare Island area.

A. This shows structures at the United States Navy Yard, and they are so marked. [79]

Q. Is there any appearance or anything indicating the building of dikes or canals northward of the

(Testimony of Paul A. Smith.)

narrow neck of land to which we have referred this afternoon?

A. I find none on this chart.

Q. Would specifications for the preparation of topographic maps of that date require the indication of dikes or canals had they existed?

A. Certainly.

Miss Phillips: I will offer this in evidence as our exhibit next in order, L-11.

(The chart was marked "U. S. Exhibit L-11.") (Set forth in Vol. IV, page 17 of this printed Transcript of Record)

Q. Did you observe on the last map that I showed you any indication of a water course crossing from Mare Island Straits to San Pablo Bay?

A. No, there was none.

Q. Can you identify the chart which I now hand you, or the survey, rather?

A. This is a hydrographic survey of Mare Island Straits and Carquinez Straits from Navy Yard Slough to Strait Point, made in May and June of 1876, on the scale of 1 to 5000.

Q. That is not a chart, that is a copy of an actual survey?

A. That is a photographic copy of the survey.

Q. What does the continuous black line on both sides of the sounding area—the soundings are marked irregularly, are they not, in feet? What does the continuous black line indicate?

(Testimony of Paul A. Smith.)

A. The continuous black line is the shore line.

Q. And the first dotted line indicates what?

A. The first dotted line seaward from the shore line represents the line of mean lower low water, as the note shows, the soundings are expressed in feet and show a depth at the line of mean lower low water of each 24 hours at plane of reference.

Q. Let me direct your attention to the fact that the soundings between the shore line and the low water line appear with a minus figure before them. The previous maps, I believe, showed these soundings in that area at zero. What is the meaning of the [80] minus sign used there?

A. The minus sign means that the land there is above the plane of mean lower low tide by the amount of the figures shown.

Q. I wonder if you could diagram what you mean by that? Just make a sketch for his Honor. Just indicate how the minus sign indicates the land above low water?

A. This represents the plane of mean lower low water. This line which I drew representing the top of the plane should be a straight line.

Q. The horizontal line across the page?

A. That is right. And should this be the line we show here then at the time the party was making the survey, they take the soundings that were subsequently reduced to this plane.

Q. Suppose we mark that "Line of low water."

A. You mean lower low water?

(Testimony of Paul A. Smith.)

Q. Mean lower low water.

A. Yes.

Q. The line drawn at an angle would represent the slope of the land?

A. The surface of the land.

Q. Suppose you just mark on the map at some point, any point where a sounding would be represented by a minus sign.

A. The minus sounding would be soundings that were taken at this point right here, which would show—for instance, if that point marked on the chart is minus 2, then this distance above the plane of mean low water would be 2 feet.

Q. Minus 2?

A. As indicated there on the chart.

Q. That would be the slope of land at that point is 2 feet above the plane of mean low water?

A. The elevation of that point.

Q. At that point? A. Yes.

Q. The zero point would be represented where?

A. That would be the point of mean lower low water.

Q. The point of mean lower low water would be zero? A. Yes.

Q. As you get out from that then the measurement would be repre- [81] sented as a positive sign?

A. There is no positive sign placed on the sounding. All soundings that do not have minus signs are positive.

(Testimony of Paul A. Smith.)

Miss Phillips: I would like to offer this in evidence.

Mr. Lipman: I would like the witness to indicate where the actual surface of the water would be, for example, when you were measuring a sounding that later turned out to be a negative sounding. Indicate some place where the water line may be the actual water surface. Will you mark that water surface?

A. Let us assume that this is mean high water.

Q. All right, assume it is mean high water.

A. And further, that that is the stage of the tide at the time they were taking the sounding. That is what you wish?

Q. I just want to bring out for the Court when you are measuring one of these soundings that turns out to be negative, of course the water is at that time above the land surface, at the point you are speaking of? A. That is right.

Mr. Olney: The fact is that these minus signs should be used where the land is above the mean lower low water line and below the mean high water line—that is where the minus signs commence?

A. I would rather put that this way, where the land is above the plane of reference, on the Pacific Coast it is mean lower low water and below mean high water.

Q. As far as these particular maps here are concerned, the minus sign is used where the land is

(Testimony of Paul A. Smith.)

below mean high water and above the mean lower low water: is that correct?

A. And outside of the shore line as shown on the chart, that is quite right.

Q. I said it was below the mean high water line. That is what you call the shore line, isn't it?

A. That is right.

Miss Phillips: I offer that chart in evidence as Exhibit L-12, and I offer the diagram as Exhibit L-13. [82]

(The chart was marked U. S. Exhibit L-2 and the diagram was marked U. S. Exhibit L-13.) (Omitted, by designation, from this printed Transcript of Record)

The Court: We will take an adjournment now until tomorrow morning at ten o'clock.

(An adjournment was here taken until tomorrow, Wednesday, June 9, 1937, at ten o'clock a.m.) [82½]

Wednesday, June 9, 1937.

Paul A. Smith,

Direct Examination (Resumed).

Miss Phillips: I think, your Honor, we had just offered in evidence the last two exhibits, L-12 and L-13, hydrographic survey of 1876, Carquinez

(Testimony of Paul A. Smith:)

Straits and Mare Island, and the little sketch showing how a minus sign is computed.

The Court: Yes. You may proceed.

Miss Phillips: Q. Mr. Smith, can you identify the survey which I now hand you?

A. This is a photographic copy of a topographic re-survey of San Pablo Bay, California, on a scale of 1 to 10,000, surveyed in October and November, 1886, by James S. Lawson, Assistant, and P. A. Welker, Sub-Assistant, Coast & Geodetic Survey.

Q. Is this a plane table survey? A. It is.

Miss Phillips: I offer in evidence, as Exhibit L-14, this chart. I will have it marked and then I will question the witness about it.

(The survey was marked "U. S. Exhibit L-14.") (Set forth in Vol. IV, page 18 of this printed Transcript of Record)

Q. Mr. Smith, can you identify the large square building on the Mare Island Straits side of the Island, right at the point where the shore takes a turn to the northwest?

A. Yes, that is the machine shop of the Mare Island Navy Yard.

Q. Can you explain some of the symbols appearing upon this chart, for example, down toward the Carquinez Straits area, the small lines there indicate what?

A. The small groups of vertical lines indicate grassy ground.

(Testimony of Paul A. Smith.)

Q. Are there any contour lines on the map?

A. No, there are no contour lines shown on this map.

Q. Are any trees shown? A. Yes. [83]

The Court: Q. Are there any trees on Mare Island? A. Yes.

Q. What kind of trees?

A. Deciduous trees, I should say.

Miss Phillips: Q. There are trees shown down on the lower part? A. Yes.

Q. Down toward the Carquinez Straits area?

A. Yes.

Q. Do you see railroad buildings or lines marked upon the chart? A. Yes.

Q. Where?

A. Running from the machine shop down on the Mare Island Straits side, there is what appears to be construction work there.

Q. I am pointing now to an area seaward from the shore line in the narrow neck of land as we have been identifying it; can you explain what that grassy area is as seen from that shore line?

A. Yes, that is grass and marsh outside of the mean high water line.

Q. Does that represent a stage of land accretion? A. I should say it does.

The Court: Q. How wide is the peninsula at that point?

A. We scaled that yesterday, your Honor. Between the shore lines it is approximately 150 meters,

(Testimony of Paul A. Smith.)

I believe. I can verify that for you, if you like, your Honor.

The Court: No, that will do.

Miss Phillips: Q. The continuous line running northwesterly on both sides indicates what?

A. That is the shore line.

Q. Why does this continuous line break off on the Mare Island Straits side, the point I am now pointing to over near the center of the map?

A. That is the northwestern limit of the survey; it is not carried farther on this sheet.

Q. And on the San Pablo side the continuous line running northwesterly represents what?

A. That is a shore line, also.

Q. Can you explain what the symbols mean between the two shore [84] lines northward of the narrow neck of land?

A. That is the conventional symbol used for marsh or meadow.

Q. What does this Marsh pole mark here right at a point midway—I should not say midway, but to the right of the San Pablo shore line, indicate?

A. The small triangle with a dot in the center that is marked "Marsh Pole," is a triangulation station that is used by the topographer to control his detail work.

The Court: Q. What is the date of that map?

A. This is 1886, your Honor.

Miss Phillips: Q. Can you identify the chart which I now hand you?

(Testimony of Paul A. Smith.)

A. This is a photographic copy of the Coast & Geodetic Survey Chart of San Pablo Bay, printed from plate No. 3197.

Q. What is the date of that chart?

A. The edition of 1915; it also is chart No. 5533.

Q. Does that show the whole of San Pablo Bay, or is it a section of San Pablo Bay?

A. This is a section of that chart.

Q. What surveys were utilized in preparing that chart?

A. Triangulation between 1851 and 1909; that would have been all surveys between those dates. The topography between 1851 and 1914. Hydrography between 1878 and 1914. Topography from other sources to 1904. Corrections from surveys by the Corps of Engineers, U. S. Army, to 1914. Corrections from surveys by U. S. Navy to 1913.

Q. What does the continuous line on San Pablo Bay to which I am now pointing indicate?

A. That is a shore line, San Pablo Bay shore line.

Q. And seaward from that line, the line near which there appears to be a coagulation of dots?

A. That is a low water line.

Q. Pointing now to the Mare Island Straits side, the continuous line appearing on the Mare Island Straits side is what?

A. That is also the shore line.

Q. And the first dotted line outward from that?

A. That is the [85] low water line.

(Testimony of Paul A. Smith.)

Q. And then outward from that would be the fathom lines which you have previously explained?

A. Yes. The depth curves on this sheet are shown by different intensity of stippling in that area. The successive ones indicate, as you progress seaward, the first one the mean lower low water line, the second one is the next depth curve, and etc., to give the navigator his channel.

Q. I am now directing your attention to the width of the neck of land to which we previously referred; can you compare the width, just by a glance at the neck of land appearing on this sheet, as compared with the previous ones?

A. It is quite obvious that it is wider.

Q. And that would represent a process of land accretion?

A. It is accretion or artificial construction—probably accretion.

Q. I observe upon this map, and perhaps the Court had better see what I am pointing to, dotted lines, etc. crossing from Boat Cut-off northward; there also appear to be straight lines somewhere near the neighborhood of Boat Cut-off; can you explain those symbols?

A. This is a road or trail, the broken line, or what might be called fine dashes. I take it that you are inquiring about these dikes or levees, are you?

Q. Yes, that is what I am really getting at. Is there any indication of dikes and levees there?

(Testimony of Paul A. Smith.)

A. Yes, as shown by these fine lines with hachures on each side of them.

Q. The witness is now pointing to hachures on the San Pablo Bay side. On the upper part of this map, Mr. Smith, appears the title or name "Island No. 1," and to the side of that "Island No. 2"; do you know when these names appeared on your Coast Survey charts for the first time?

A. They appeared on the first edition in 1904, I believe. [86]

Q. Do you know the origin of it?

A. Yes, the origin was the topographic survey—the United States Geological Survey's quadrangle, published in 1902.

Q. Do you know whether they appear on current maps?

A. No, they do not. I think the last edition they appeared on was 1924.

Miss Phillips: I will offer the chart of San Pablo Bay to which the witness has just referred—

Q. That was published in what year?

A. I think in 1916. It is in the title.

Miss Phillips: I will offer that as Exhibit L-15.

(The chart was marked "U. S. Exhibit L-15.") (Set forth in Vol. IV, page 19 of this printed Transcript of Record)

Q. Can you identify the chart which I now hand you?

A. Yes, this a photographic copy of a Coast & Geodetic Survey chart of Mare Island Straits on

(Testimony of Paul A. Smith.)

a scale of 1 to 10,000. This is known as Chart No. 5525, and is printed from plate 3530.

Q. And published when?

A. The date was in March, 1916.

Q. This chart utilizes what surveys?

A. The original surveys as stated in the title are original surveys from 1886 to 1914, surveys by the United States Navy to 1915, and surveys by the United States Engineers to 1914.

Miss Phillips: I offer this in evidence as Exhibit L-16.

(The chart was marked "U. S. Exhibit L-16.") (Omitted, by designation, from this printed Transcript of Record)

Q. Mr. Smith, in speaking of these maps we spoke of utilizing several surveys. Will you state what the practice of the Coast Survey is in initiating new topographic or hydrographic surveys? I do not mean to go into great detail, but just state the general practice.

A. When the need for hydrographic or topographic surveys becomes apparent for the purpose of correcting or revising the nautical charts then these surveys are made.

Q. To what extent is prior material accumulated in prior surveys used?

A. It is used in so far as the new surveys do not disprove [87] that material.

Q. Each chart, then, would utilize the accumulated information upon the region in question in

(Testimony of Paul A. Smith.)

so far as it was found to be accurate and trustworthy: is that your testimony?

A. That is correct.

Q. What is the drawing which I now show you?

A. That is a drawing of the shore line of Mare Island, California, and vicinity, from the original topographical survey of the Coast & Geodetic Survey, reduced by cartographic methods to the scale of 1 to 30,000.

Q. Will you explain how that was prepared?

A. It was prepared under my direction by J. A. McCormick, Associate Cartographic Engineer in the Coast & Geodetic Survey.

Q. I wish you would explain a little more in detail to the Court what was the source of the material you used there?

A. The source of material for this was the original surveys of 1851 to 1856, those of Cutts and Rodgers for the purpose of presenting on this the shore line from those surveys and using a scale of 1 to 30,000.

Q. Were those original surveys on that scale of 1 to 30,000?

A. No, they were on the scale of 1 to 10,000.

Q. Would it be fair to say that this drawing is compiled from the surveys of Cutts and Rodgers, but on a reduced scale?

A. In so far as the shore line is concerned. The other details are not.

(Testimony of Paul A. Smith.)

Q. What have you to say as to the accuracy of that drawing?

A. It is as accurate as can be made by the modern cartographic methods used in the construction of all of the charts of the Coast & Geodetic Survey?

Miss Phillips: I would like to offer this as Exhibit M-1, and I would like to place it on the Court's desk to use in offer- [88] ing the next exhibits, which will be self-explanatory.

(The drawing was marked "U. S. Exhibit M-1.") (Omitted, by designation, from this printed Transcript of Record)

Miss Phillips: Mr. Olney has one question of the witness before I ask him to identify the next exhibit. I have no objection. I think it might save time if I had him identify what it was and how it was prepared.

Mr. Olney: It has reference to the map that has already gone in, as well.

Miss Phillips: Very well.

Mr. Olney: Q. As I understand it, when you use the expression "Shore line" there, you mean the line of mean high water: is that correct?

A. That represents the shore line as determined by the topographical surveyor on the ground which has always been the closest approximation that he could get with his method to mean high water.

Miss Phillips: Q. Lieutenant Smith, can you

(Testimony of Paul A. Smith.)

identify or explain what is the drawing on the transparent sheet which I have just handed to you?

A. This is a tracing from a photographic enlargement of Captain Beachey's map of 1827 to 1828, which was published on a scale of 1 to 300,000, enlarged to a scale of 1 to 30,000, as shown on here.

Q. That is the Beachey map which you identified and explained yesterday?

A. This is the shore line taken from the Beachey map of this vicinity.

Q. Will you explain the scale on which that map has been prepared a little more in detail to the Court?

A. I take it that you mean the method by which the Beachey map was drawn to this scale. The method that was used was by photographing the enlargement of this section of Beachey's map to the scale of 1 to 30,000, after which Mr. McCormick made this tracing of the shore line from that photographic enlargement. [89]

Q. Is that on the same scale as the exhibit next preceding, M-1, the drawing which is on the Court's desk?

A. That is right, 1 to 30,000.

Q. What have you to say as to the accuracy of that transparent sheet or reproduction of Beachey's shore line?

A. It is as accurate as can be done with methods that are known today.

(Testimony of Paul A. Smith.)

Miss Phillips: The purpose of this is, it will enable the Court to make a visual comparison of the shore line as shown in the successive maps which were introduced yesterday. May I have this marked M-2? The Court can make a visual comparison, himself, I believe, of the shore line shown on the different maps.

(The tracing was marked "U. S. Exhibit M-2.") (Omitted, by designation, from this printed Transcript of Record)

Q. Will you slip that over the preceding exhibit and show how the Court may make a visual comparison at his leisure?

A. Now, your Honor, all of the information which is on Beachey's map that would enable the cartographer or anyone else to correlate that information with the best survey which we have underneath it is shown on this.

Q. Can you identify the drawing on a transparent sheet which I now hand you?

A. This is the shore line of Mare Island, California and vicinity from the map of Sacramento River and Bay of San Pablo by the United States Exploring Expedition of 1841, which was published on a scale of 1 to 300,000, also enlarged by photographic methods to a scale of 1 to 30,000.

Q. What have you to say as to the accuracy of that reproduction of the Wilkes Expedition map?

A. It was done by the same method as that of

(Testimony of Paul A. Smith.)

the map of Captain Beachey, and is equivalent in accuracy.

Q. Each of these transparent sheets shows on its face, does it not, the title of it, the original of which was used in compiling the transparent drawing? A. They do. [90]

Miss Phillips: I will offer this in evidence and ask that it be marked Exhibit M-3.

(The tracing was marked "U. S. Exhibit M-3.") (Omitted, by designation, from this printed Transcript of Record)

Q. Mr. Smith, I have observed upon Exhibit M-3, the last transparent map, a dotted line in the northwesterly portion of the drawing. Can you explain why the line appears dotted very near midway in the shore line?

A. I suggest we get the exhibit showing the original exploring expedition chart and it will probably be obvious from that.

Q. That will be Exhibit K-2 offered yesterday?

A. You see, that represents the section which on the Exploring Expedition Map of 1841 has no shore line; here is a symbol that was used to indicate marsh land.

Q. That is, the dotted line there indicates that that map from which the transparency was compiled did not carry the shore line to that point?

A. That is right. The photographic enlargement was indefinite, because the original carries no full continuous shore line in that vicinity.

(Testimony of Paul A. Smith.)

Q. How would you say that this dotted line of the shore line in that part was determined?

A. That was traced from the limit of the marsh symbol, which is shown on the U. S. Exploring Expedition map of 1841, the seaward limit of that marsh.

Q. This is the United States Exploring Expedition of 1841? A. Yes.

Q. And the transparent map which I now hand you, Mr. Smith, is how compiled?

A. It is a transparency made in a similar manner from a corrected map, from actual surveys and examinations embracing a portion of California drawn by F. D. Stuart, in 1849, published on a scale of approximately 1 to 450,000, and also enlarged photographically and traced on a scale of 1 to 30,000.

Q. That is on the same scale of the drawing Exhibit M-1, which is to be used in making visual comparison? A. That is right. [91]

Miss Phillips: I will offer the last transparency to which the witness has referred, representing an enlargement to scale of the Stuart Map of 1841, and ask that it be marked the next exhibit in order, which would be M-4.

(The tracing was marked "U. S. Exhibit M-4.") (Omitted, by designation, from this printed Transcript of Record)

Q. Can you identify the transparent map which I have just handed you?

(Testimony of Paul A. Smith.)

A. This is a tracing from a photographic enlargement of the shore line of Mare Island and vicinity from a chart of the Bay of San Pablo, by Cadwalader Ringgold, Commander in the United States Navy in 1850, which chart was published on a scale of approximately 1 to 75,000. The scale of this transparency is 1 to 30,000.

Q. Was this prepared in the same way as the previous transparent map?

A. In the same way and by the same cartographic engineer.

Q. That is on the same scale as the others?

A. Yes.

Miss Phillips: I would like to offer that in evidence, your Honor, as Exhibit M-5.

(The tracing was marked "U. S. Exhibit M-5.") (Omitted, by designation, from this printed Transcript of Record)

Q. Is the last exhibit the transparent reproduction of Ringgold's chart a reproduction of the shore line of the Mare Island area as taken from Ringgold's general chart, or was the later sheet, I believe sheet 2, utilized in preparing that?

A. This was taken from the larger scale.

Q. From the larger scale?

A. On which that island shows.

Q. I believe that is sheet 2. The original exhibits will show which sheet it was. What is the transparent map which I now show you?

(Testimony of Paul A. Smith.)

A. This tracing from the photographic enlargement of the shore line of Mare Island and vicinity from a new map of the Gold Region of California, by Charles Drayton Gibbs, in 1851.

Q. Was that prepared in the same way as the earlier maps in this exhibit letter?

A. It was, and by the same person. It should [92] also be mentioned that the original map is on the scale of approximately 1 to 1;250,000. The scale of this tracing is 1 to 30,000.

Miss Phillips: I will offer this in evidence as Exhibit M-6.

(The tracing was marked "U. S. Exhibit M-6.") (Omitted, by designation, from this printed Transcript of Record)

Q. Can you identify the sheet of drawings which I now hand you?

A. This is a photographic copy of the original shore line and the five transparencies reduced to half scale, that is, 1 to 60,000, for convenience of record.

Q. Let me state in my own language what I understand this last drawing is. Upon this last drawing you have photographed Exhibits M-1 and several of the transparencies, and then placed as a composite drawing showing each one of those on one sheet?

A. Perhaps I can clarify that.

Q. Yes, I think it would be better if you would.

(Testimony of Paul A. Smith.)

A. The way this was prepared was simply this: the six exhibits we have just looked at prior to this were placed on an easel in the shape in which they appear on this, and were photographed to this scale, and this is simply a reproduction of that.

Mr. Olney: Q. Then it is not a composite chart or drawing. That sheet simply reproduces on a smaller scale all of these various maps?

A. Yes, that is right.

Miss Phillips: I have it in my notes that I have introduced—is it six transparencies or is it five?

The Clerk: There are five of these, and also the original, which would be six.

Miss Phillips: Six, that is right.

The Court: Then I suppose the chart, or map, or whatever you call it, which you have in your hand, contains M-1, M-2, M-3, M-4, M-5 and M-6?

The Witness: There are six drawings shown on this. The [93] first is the original on the backed paper, which you have called M-1, and the others are five transparencies, which would make six in all.

Miss Phillips: Q. And the Coast & Geodetic Survey chart which was used as a standard of comparison, is which one on this drawing you are now looking at?

A. The one in the lower left-hand corner.

Q. And each of the other drawings is designated on its face, is it not? A. Yes.

(Testimony of Paul A. Smith.)

Miss Phillips: I will offer this in evidence as Exhibit N.

(The reproduction was marked "U. S. Exhibit N.") (Set forth in Vol. IV, page 20 of this printed Transcript of Record)

Q. Do hydrographic charts show any land stations of hydrographers?

A. You mean by land stations such signals or marks which he may have erected, or natural objects which he might have used to locate his position while in the water?

Q. Yes. A. Yes, certainly.

Q. How are those land stations indicated upon a hydrographic survey?

A. They are indicated upon the survey sheet sometimes by small circles, sometimes by small triangles with a black dot in the center.

Q. Would there be any difficulty in locating those on a hydrographic chart; in other words, is it quite evident?

A. Yes, it is quite evident.

Q. How would you define tide land?

A. I should say that tide land is the land between the mean high water line and the mean low water line.

Q. What does the term "fore-shore" mean?

A. The fore shore is also the land between the mean high water line and the mean low water line.

Q. That is, you take those terms to be synonymous, would you? A. Yes, I would. [94]

(Testimony of Paul A. Smith.)

Q. Is there such a term as "back shore"?

A. Yes, the term "back shore" as used, I think first by Douglas Johnson, was used to designate the land area above mean high water line and as far shoreward as the storm water line or cliff that may exist at that place.

Q. You have given a definition by Douglas Johnson: Who is Douglas Johnson?

A. He is the professor of physiography at Columbia, I believe. He published his researches some years ago on beach processes and erosions.

Q. Is he a standard authority? A. Yes.

Miss Phillips: You may cross-examine.

Mr. Lipman: May I ask the Court for a ten-minute recess? I want to re-arrange these maps for my use on cross-examination.

The Court: Yes, we will have a recess for ten minutes.

(After recess:)

Cross Examination

Mr. Lipman: Q. Lieutenant Smith, I understood from your testimony of yesterday that you have been up over the lands we are talking about here. Have you made any extended study of those lands on the ground? A. No, sir.

Q. And, as I understand it, your testimony with reference to these maps, other than the testimony you gave with regard to sand samples, is based

(Testimony of Paul A. Smith.)

upon the maps, themselves, and your experience with maps, etc., and not upon a physical examination of the ground? A. That is right.

Q. You were asked with regard to a great many of these maps, as to whether you saw anything that would indicate a water course from Mare Island Straits over to San Pablo Bay; I think the questions were intended to mean at or around the portion that we have talked about as the neck; is that correct?

Miss Phillips: That is objected to, your Honor. The question [95] was not limited to that. The question as to one or two of the early maps was limited to a water course across the neck, but the later questions were certainly not limited to that. They were much broader in scope. I am quite sure the record will bear me out.

Mr. Lipman: I am not attempting to limit it. I had better refer to a map.

Q. Let us take, if you will, Exhibit L-15: As I understand your testimony given by you yesterday it is that there were no indications on that map, or the other maps, of a water course from Mare Island Straits over to San Pablo Bay?

Miss Phillips: Objected to as misstating the testimony. This exhibit was offered in court just about thirty minutes ago, and I believe on such question was asked the witness. This is one of the last exhibits offered in court this morning. It was put in with very brief questions.

(Testimony of Paul A. Smith.)

Mr. Lipman: I will reframe the question.

Q. Did you testify yesterday, Lieutenant Smith, as to a number of Coast Survey charts that were shown to you yesterday, that you saw nothing on them that would indicate a water course extending from Mare Island Straits over to San Pablo Bay?

A. Yes.

Q. And so far as those charts showed the line clear up to Sonoma Creek, your testimony was that that line appeared to be continuous?

A. You are speaking about the Coast & Geodetic Survey charts, are you?

Q. Correct. A. That is right.

Q. By the way, may I ask you, in the earlier days was the body that is now known as the Coast & Geodetic Survey known as the Coast Survey?

A. Yes, that is right.

Q. Do you know when they added "geodetic" to the name?

A. I do not recall the exact date. That is a matter of record [96] on the official reports, however.

Q. The Coast Survey and the Coast & Geodetic Survey are really the same organization, continuing in time? A. That is quite right.

Q. On any of the Coast Survey charts which were shown to you either yesterday or this morning, is there anything to indicate with respect to that section that we have called the neck, and which you have testified was indicated as marsh, what the sur-

(Testimony of Paul A. Smith.)

face elevation of that marsh was, other than that it is something above mean high water?

A. There were no elevations shown on any of the original surveys or charts in the vicinity of the neck to which you refer.

Q. So that on none of the Coast Survey charts which you have been shown, and as to which you have testified, are any of these elevations given?

A. You mean in that isthmus?

Q. Yes. A. No, there are not.

Q. Is it or is it not consistent with your testimony that the elevation there is very slight indeed above the mean high water line?

A. Can you define for me what you mean by "slight indeed"? That is rather an indefinite term.

Q. Is there anything on these maps to show whether that marsh area in the neck is more or is as much as a foot above the mean high water mark?

A. There is no information as to elevations whatsoever on those charts, so that it cannot be said by looking at the symbols what the elevation is: all that can be said is, as you have stated in one of your questions, that it is above mean high water.

Q. If the surveyor who was out making this map should come upon that neck and determine, according to the best of his judgment, that there was an area there that was six inches above the mean high water mark, he would indicate it, would he not, just as has [97] been indicated on the Coast Survey charts which you have been shown?

(Testimony of Paul A. Smith.)

Miss Phillips: That is objected to. I wish counsel would be more specific in pointing out a survey chart in which the six inch elevation is indicated.

Mr. Lipman: I didn't say it was indicated.

Miss Phillips: I thought you said you referred to Coast Survey charts in which six-inch elevations were indicated. Let us have the question read, perhaps I misunderstood counsel.

Mr. Lipman: Q. I will ask you, Lieutenant Smith——

Miss Phillips: Just a moment, Counsel, I am asking to have the question read.

The Court: Well, the question has not been answered.

Mr. Lipman: I was going to ask another question, but perhaps it will be better to have the question read. Please read the question, Mr. Reporter.

The Court: What is the use of having a controversy about it. Just proceed with your new question.

Mr. Lipman: All right, your Honor, I will ask a new question.

Q. I will show you now Exhibit L-6, and I will refer to the points which you marked on that map yesterday as Points A and C, point A being the Mare Island Straits side of the neck, and Point C the San Pablo side. I will ask you if the surveyor when he came to that point in making the chart had found in his computations that the area between points A and C was, say, six inches above the line shown as the shore line or mean high water mark,

(Testimony of Paul A. Smith.)

would he have indicated it on this map just the way it is indicated now?

A. Yes, if he had found that the land between points A and C was above mean high water to the best of his judgment, it would be so indicated.

Q. And it does not make any difference how much or how little, does it, so long as it is above?

A. That is right. [98]

Q. Would it make any difference to him what the character of the area was, as being marsh, dry land, or anything else, so long as he thought it was any distance above m n high water mark he would show it in this fashion, would he not?

A. You mean by these finely spaced parallel lines?

Q. No, I don't mean that, I mean that the drawing of the shore line is not dependent upon the character of the land at the place where the line is drawn, is it? A. Oh, yes, it is.

Q. It is? A. Sometimes.

Q. Then let me ask you this question: suppose he had found land between these two places to be good, hard, dry land, he would not have indicated it as is indicated on this chart, would he?

A. You mean he would not have filled it in by the finely-spaced lines?

Q. Correct. A. That is right.

Q. In other words, that means to his mind that it was marsh? A. That is right.

(Testimony of Paul A. Smith.)

Q. And, of course, the character of it, being very wet marsh or only slightly wet marsh, is not indicated at all here, is it?

A. No, that is not differentiated.

Q. Now, suppose you were told that there are eye witnesses who have seen water going clear across the neck in a broad sheet at extra high tide, is there anything in any of the testimony that you have given which is contrary to that?

A. Nothing that I recall.

Q. You do not intend by your testimony to indicate, then, that these maps show, or any of these maps show, as to which you have testified, that water did not go clear across the neck in a broad sheet at times of extra high tide?

A. You are taking in quite a lot of territory there. On all those maps I can recall nothing that I have said that would prevent such a thing from occurring. [99]

Q. Let me ask you the question in another way: The mere fact that there is what appears to be a solid shore line there is not inconsistent with the fact that the water can go clear over that in a sheet at times of the higher tides? A. No.

Q. Some question came up yesterday as to comparisons of accuracy. There is no doubt in your mind, is there, that the maps and charts prepared by the Coast Survey and the Coast & Geodetic Survey are more accurate than any of the other maps you have testified to in court, here?

(Testimony of Paul A. Smith.)

A. Oh, there is no doubt about that.

Q. In your judgment, it is not even a close case, is it?

A. Just what do you mean by that?

Q. I mean is it your judgment that the Coast Survey charts are much more accurate than any of the other maps to which you have testified?

A. Certainly.

Q. Now, I want to call your attention first to a group of maps introduced in evidence as Exhibits J-1 to J-7, I believe, which is all this bunch of early maps, and I want to ask you if, in your judgment, any one of those maps is, in the light of the later Coast Survey charts, even approximately accurate?

A. These are the exhibits that we had yesterday, are they?

Q. Yes, those are the ones.

A. Yes, they are approximately accurate in so far as it is possible to determine by prominent points, prominent islands, and bodies of water.

Q. Let me ask you the question this way: I will show you now Exhibit J-1 and ask you to look at the area which is the equivalent on that map of Mare Island and vicinity on the Coast Survey charts—do you see that area? A. Yes, I do.

Q. Do you believe that the Mare Island area at the time that chart was made looked like that, or that it looked like the charts that the Coast Survey has prepared?

(Testimony of Paul A. Smith.)

A. That would be purely hazarding a guess, so far as I am concerned. It is pos- [100] sible to identify the straits that are in that vicinity.

Q. Precisely, but what I am trying to get at is this: Do you think that between the time J-1 was made and the time the Coast Survey charts were made, the area in the vicinity of Mare Island changed as it would need to change so that it *would like* it does on J-1 when that map was made, and as it looks on the Coast Survey charts?

A. No.

Q. And that is true of all the other charts in this group, J-1 to J-7, is it? A. That is right.

Q. Calling your attention now to the Beachey Map, does this map give indication that the area in the vicinity of Mare Island was actually surveyed, or does that indicate more the sketch of the map maker after looking at the land?

Miss Phillips: May I have the exhibit number on that?

Mr. Lipman: K-1.

A. It is impossible, of course, to make a map without some kind of a survey. I don't know what method Captain Beachey used, but the fact that he has delineated the shore line with a full solid line would indicate that he had made some kind of observation in the vicinity of what is known as Mare Island to give him the information as shown on this map.

(Testimony of Paul A. Smith.)

Q. Do you think he used the plane table method?

A. I do not know, that is in 1827. It is quite possible that he might have used the plane table method: The plane table was known as far back as 1500.

Q. You do not think that he actually surveyed up toward what on the Coast Survey chart appears as Sonoma Creek from this map?

A. Yes, he indicates something here to be Sonoma Creek near the northernmost limit of his chart.

Q. He does not show what shows on these other charts as South Slough, does he?

A. I cannot say that he does or does not. There are three sloughs shown, as you will see on the Mare Island Straits [101] side of the land.

Q. But he does not show a full following out of any of those sloughs?

A. No, he apparently stopped his survey in the vicinity of where Mare Island Straits stops.

Q. I will now show you Exhibit K-7, which is Ringgold's Sheet No. 2, and ask you if the large area up toward Sonoma Creek and the upper end of Napa Creek, does that area appear to have been surveyed inland at all, or merely the water boundaries?

A. He has shown merely the water boundaries and the width of the tip of land inland from that, approximately a mile east, half a mile.

(Testimony of Paul A. Smith.)

Q. He does not show, though, any survey in the broad area here indicated what water courses may or may not have been in that area at all?

A. No, there is no indication given on that map.

Q. Do you conclude from looking at this map that this area was actually surveyed in the sense that any instruments were used in running the lines, or is that from your point of view merely sketched in?

A. It is difficult to say what method he used in that region. I should say that he has made some kind of an investigation through there, and he was known by the Coast Survey officers at that time to have used similar methods, not so much in detail as the Coast Survey was using.

Q. The point down here in the area of Mare Island indicates a much greater or a more detailed investigation than this area to the northwest?

A. Not necessarily. There is nothing shown on the map to indicate whether it was a detailed investigation or otherwise.

Q. By the way, a question was asked yesterday, I think, with reference to one of the earlier coast survey charts, as to that broad expanse of swamp to the northwest of the area marked "Mare Island," and I believe the question was asked whether you saw anything indicating artificial work in that area.

[102]

Miss Phillips: May I ask which map counsel is referring to?

(Testimony of Paul A. Smith.)

Mr. Lipman: I cannot be sure, but I think it was L-6, which was the Rodgers chart of 1856.

A. What is your question, then?

Q. I say, you were asked yesterday, I think, and I will ask you, do you see anything on this chart to indicate any artificial work, anything like levees, dikes, drainage or anything to the north or northwest of the neck, to the northwest of the area marked "Mare Island"—do you see anything up here indicating such work as that?

A. No, I do not see any.

Q. The same thing is true of the continuation which is marked L-7?

A. I believe so, but I will look at it again. No, I find no artificial work.

Q. The chart maker would have shown any such work, would he not, customarily, if he found it?

A. Yes.

Q. So that, in your opinion, do not these charts indicate to the best of the map maker's ability the natural conditions as he there found them?

A. I should say that they do.

Q. One further question I want to ask you with regard to L-6, on the area marked "Mare Island," toward the southeasterly end, it says "Mare Is.", and then "S.E." What does that indicate?

A. "S.E.," I take it that that is the triangulation station, although the photographic copy is so poor—this was a point that was designated as Mare Island Southeast, and this one Mare Island North-

(Testimony of Paul A. Smith.)

west—that is the triangulation station that he had.

Q. You are now pointing to a designation on the map a little bit northwesterly of the "M" in "Mare" of "Mare Island" on that map? A. Yes.

Q. You think those marks indicate triangulation stations? A. That is what they are, yes.

Q. Lieutenant Smith, I would like to inquire now as to what the [103] purpose of the map maker and surveyor is in putting the names, or placing names on his map or chart?

A. A surveyor?

Q. A surveyor or map maker, or both, if they are different.

A. They are different in that the surveyor puts the name on the features, be it an island, a mountain, or a river that he ascertains in the field, is the name in local usage. That name appears on the chart, if it is subject to controversy, only after it has been proved by such investigation as can be made into its authenticity.

Q. In other words, the surveyor, when he goes out, makes his inquiry as to what the local usage is, as to various names of places, and in his survey he indicates what he ascertains in that respect?

A. Yes, if he has found local names in usage.

Q. If there are no local names sometimes he makes one of his own? A. That is right.

Q. When the material the surveyor obtains goes into the office of the Coast Survey and they make charts, they take that data, and if they believe it to

(Testimony of Paul A. Smith.)

be uncontroverted and accurate they place it on their charts? A. Yes.

Q. If it is deemed controversial they do not place it on the chart until they satisfactorily to their own minds find out what the fact is?

A. That is right.

Q. The purpose, of course, is one of identification, is it not?

A. For the purpose of navigation.

Q. I mean identification of the various points.

A. Right, for navigators' use as shown on the nautical charts.

Q. And the attempt, of course, is to indicate as best you can by the name what the area is that bears that name? A. Certainly.

Q. I will now hand you Exhibit L-15, which is a Coast & Geodetic Survey chart of the area in the vicinity of Mare Island, and I will call your attention to the fact that the words "Mare Island" [104] are placed on that map along that body of high land which lies to the southeast of the neck, which we have referred to.

Miss Phillips: May I have the date of that map, please?

Mr. Lipman: This map is the edition of 1915, I believe January, 1915.

Q. I will ask you what, to your mind, the placing of the words "Mare Island" in that fashion is intended to represent?

(Testimony of Paul A. Smith.)

A. It simply indicates the topographer's or cartographer's knowledge or impression of what should be shown as Mare Island. However, there are many instances in the Coast & Geodetic Survey charts of a similar nature of different names of one land area.

Q. I will point now to the area indicated as Island No. 1. Now, had it been the thought either of the surveyor or of the man who made the chart that in common usage that area was called Mare Island, would he have placed the name "Mare Island" as you see it on this chart?

A. In the first place, as I have mentioned in the previous answer, Island No. 1 was taken by the cartographer from the Geological Survey quadrangle, so that is where that name comes from, as shown by our chart records.

Q. To come back now to my question, if the man who prepared this chart understood that the area designated on this map as Island No. 1 was commonly known and referred to as Mare Island would he have placed the name Mare Island down where you find it on this chart?

A. I do not think so.

Q. Let me put the question in another way: Suppose you are constructing a map for the Coast & Geodetic Survey of this area, and you are advised, and find nothing in your records to show to the contrary, that the high land to the south of the neck was the area that was known and is known com-

(Testimony of Paul A. Smith.)

monly as Mare Island, and that the area shown here as Island No. 1 was not known as Mare Island, would you place the name Mare Island on the chart in a [105] similar fashion as has been done here?

A. Yes.

Q. Now, suppose your information were to the contrary, that the entire area of Island No. 1 clear down to and including the high land was what was commonly known and understood to be Mare Island, and you were trying to indicate that fact on your chart, would you then place the name Mare Island on the chart?

A. We are assuming now that this is an original compilation of the chart of that vicinity?

Q. Yes.

A. I should make this point clear, your Honor, because names such as these that were placed on the original chart in a particular locality are not always changed unless subsequent information shows them to include the whole area as we are taking here. However, if it were a new compilation and assuming what you say, it would be placed over the entire area.

Q. In other words, if a man drawing a chart of Mare Island understands that Mare Island means the land clear from Sonoma Creek down to Carquinez Straits, the method of indicating that is to put the name Mare Island down along the whole expanse?

(Testimony of Paul A. Smith.)

A. Yes, in so far as it does not interfere with topographical features.

Q. And it would be perfectly proper, on a chart like this? A. Probably, yes.

Q. Now, you say that the name "Island No. 1" comes from the Geological Survey quadrangle map?

A. Yes.

Q. Even so, the placing of that name on this chart indicated the thought of the chart maker who made the chart at the time that that was its accepted designation?

A. I could not say that; he accepted that information as authentic from the Geological Survey.

Q. And the surveys used that in making this chart? A. Yes.

Q. Now, let us go back to some of the earlier maps. I now refer again to L-6, which shows the high land of Mare Island, and a very large portion of the swamp to the northwest, which I will say [106] is known as Swamp Land Survey No. 34, and 569, and you will note that the words "Mare Island" appear on a high land southeasterly of the neck?

A. Yes.

Q. That indicates, does it not, that the chart maker who made this chart in 1856 understood that the generally accepted designation of Mare Island referred to the high land?

A. Not necessarily. This, of course, is not a chart, but is a survey.

Q. Then the surveyor was of that impression?

(Testimony of Paul A. Smith.)

A. Not necessarily. He put that on there as labeling Mare Island; whether or not he intended it to be limited to any particular section I don't know.

Q. If he went at it the way the Coast Survey usually goes at it, and if he had thought that this area up to the northwest toward the top of the map was also a part of Mare Island, wouldn't it have been his ordinary method to indicate that on the survey?

A. If you are asking me if I would do it, if I was making the survey, I would say yes. I don't know what his intention was.

Q. If anybody under your direction were making it you would expect him to do that, wouldn't you? A. Yes.

Q. You would have expected a surveyor in the Coast Survey back as far as 1856 to do it, too, wouldn't you? What I am trying to get at is, are you trying to tell me there is a difference between the way they use today and the way they used to do it then?

A. No, I am not trying to tell you that.

Q. Do you believe that the method——

Miss Phillips: I think you interrupted the witness.

Mr. Lipman: All right.

A. No, there was no interruption.

Q. Your understanding is that the method used today with regard to the names is precisely the

(Testimony of Paul A. Smith.)

same one that was in use with the Coast Survey in 1850, is it not? A. So far as I know it is.

Q. You have no reason to doubt that you do know, do you? A. No. [107]

Q. I now show you Exhibit L-11; this exhibit is a chart, is it not? A. This is a chart.

Miss Phillips: May I have the date of that?

Mr. Lipman: Yes, 1863.

The Witness: That is correct.

Mr. Lipman: Q. As I understand it, this chart was constructed on the basis, among other things, of the Cutts and Rodgers previous surveys?

A. Yes, it is so stated in the title.

Q. You will note, again, that the term "Mare Island" is down on the high land and not at all up in the vast marshy area to the northwest?

A. That is quite evident.

Q. Is it not your testimony, as with the previous exhibit, that that is intended to indicate that the chart maker understood that the high land was what was commonly known as Mare Island?

A. Yes.

Q. If he had understood that all of this swamp to the northwest was commonly known as Mare Island, he would have put the words "Mare Island" clear along the whole expanse, would he not?

A. I should say so.

Q. I can perhaps shorten the examination on this point. Your testimony would be exactly the same with regard to any of the other Coast Surveys,

(Testimony of Paul A. Smith.)

or Coast Survey charts which show the words "Mare Island" on the high land and do not show that up there on the Marsh?

A. I am not sure that I understand your question thoroughly. Let me say this, that the feature that would be labeled "Mare Island" would have been accepted on whatever the local information showed; whatever the policy of the Coast Survey is now it would have been at that time, probably.

Q. In other words, when they put "Mare Island" where they put it, it was because they understood that local usage was that that is what they called Mare Island?

A. The words "Mare Island," yes.

Q. And if they had understood that the local usage was to include [108] all that swamp as a part of Mare Island they would have put the name on differently, so as to have indicated that fact?

A. I think so.

Q. Referring again to Exhibit L-6, which is the Rodgers survey of 1856, I wish you would examine the slough, or whatever you will call it, that is marked on this map "Boat Cut-off," examine it through its entire length, if you please.

A. Yes, I have already done that.

Q. This map indicates, does it not, that Boat Cut-off is a continuous natural water course clear from Mare Island Straits or Napa Creek around up to and into South Slough?

(Testimony of Paul A. Smith.)

A. Which is marked on here as Navy Yard Slough?

Q. Correct. A. Yes.

Q. So that that is a continuous water course for the entire distance I have just indicated?

A. Certainly.

Q. That indicates, does it not, that at that time this area which is in the body of the slough, itself, was below the main high water mark?

A. Yes.

Q. And, as you said, the water course is absolutely continuous? A. That is right.

Q. You don't see anything on this chart, do you, to indicate anything other than that condition is natural and had existed for years?

A. No, I see nothing on it.

Q. I will now call your attention to Exhibit L-7, which is a continuation of the chart or the survey we have just looked at. I will point to a slough here which bears no name, but begins at a point which I shall mark A, and ask you if that slough which takes off from what is called Navy Yard slough goes around in a continuous natural water course to a point which I will mark B, which is also on Navy Yard Slough.

A. Yes, it is obvious that it does, that is, that the shore line is continuous on both sides of that [109] slough.

Q. Which means that that is a natural water course, the bed of which is below mean high water mark? A. That is right.

(Testimony of Paul A. Smith.)

Mr. Lipman: For the purpose of the record I will state that the slough that I am speaking of will be shown later probably on other maps as Montgomery Slough.

Miss Phillips: I think Counsel might mark those two points a little more distinctly, because it is hard to pick them out.

Mr. Lipman: I will put a circle around them.

Q. I will now call your attention to Exhibit L-11, which is the chart of 1863, and ask you if that does not likewise show Boat Cut-off and this other slough which I have spoken of as Montgomery Slough as being continuous from one end to the other?

A. It shows Boat Cut-off as being continuous and I believe this slough is the one you have indicated as Montgomery Slough——

Q. Yes.

A. (Continuing) It is also shown as continuous on this chart.

Q. In other words, this chart shows precisely the condition that is shown on the chart I have just shown you previously? A. Yes, on the survey.

Q. On the survey. A. Yes.

Q. I will now show you a map which is marked by a piece of paper that I have attached to it, "Map of Region Adjacent to the Bay of San Francisco, 1873, State Geological Survey of California, J. D. Whitney, State Geologist," and ask you to

(Testimony of Paul A. Smith.)

look at the area on that map that is in the vicinity of Mare Island, and the swamp to the north.

Miss Phillips: Just a moment. Your Honor, I do not believe this is proper cross-examination. I have not questioned the witness in my direct examination upon this map.

Mr. Lipman: If the Court please, I do not understand that the [110] examination of an expert witness is limited only to the exact documents that were asked about on direct examination. I am willing to waive that and make the witness my own for this question, if there is any point about it.

Miss Phillips: My point is that I don't know that the witness is shown to be familiar with this map. I have not offered it, I have not identified it.

Mr. Lipman: I am merely asking him to look at it.

The Court: Yes, that is all. You may proceed. I think you have stated the rule clearly enough.

Mr. Lipman: Q. I will ask you whether or not on this map the slough marked as "Boat Cut-off" and the slough called Montgomery Slough are also shown as continuous natural water courses from one end to the other?

Miss Phillips: May I ask this question of counsel, if both these sloughs appear there? You have so far referred to Montgomery Slough as something you are going to show by that name. My question now is, does the name Montgomery Slough appear on this map?

(Testimony of Paul A. Smith.)

Mr. Lipman: It does not. To avoid any difficulty about that I will mark on this map of 1837, this Whitney Map, the point I have referred to as C and D.

A. Boat Cut-off is so labeled and is shown as a continuous water course except for what appears to be some sort of a cartographic error in the upper region. There is a line across it up there. The other slough is shown continuous except in one place where it narrows to a single line.

Mr. Lipman: I will show this to your Honor. This is Boat Cut-off. Montgomery Slough is that. I will offer the map that I have just questioned the witness about as Defendants' Exhibit 1.

(The map was marked "Defendants' Exhibit 1.") (Set forth in Vol. IV, page 34, of this printed Transcript of Record.)

The Court: I wish to notify counsel that tomorrow at noon [111] it will be necessary for me to continue this trial until the following morning, Friday, at ten o'clock. We will now be in recess until two o'clock this afternoon.

(A recess was here taken until two o'clock p.m.)

[111½]

(Testimony of Paul A. Smith.)

Afternoon Session.

Paul A. Smith

recalled for further cross-examination.

Mr. Lipman: I have no further questions.

Redirect Examination

Miss Phillips: Q. Mr. Smith, this morning on cross-examination, I think with reference to Exhibit L-6, which is the Rodgers Survey of 1856—possibly it was the later survey, of 1886—anyway you use the term that a certain symbol refers to marsh or meadow; is the same symbol used to indicate marsh as well as meadow? A. Yes.

Q. I wish you would define the terms "marsh" and "meadow".

A. That can be defined this way: meadow is simply a late stage in the development of marsh; meadow is low land lying above mean high water, overflowed by spring and abnormally high tides carrying vegetation, usually grass that is used for hay.

The Court: Q. May we not say, as matter of common knowledge, that there is no meadow around the bay upon what we call marsh land?

Miss Phillips: I don't know, your Honor, as to that. I would not undertake to say that.

The Court: Those of us who have lived about the Bay for a long time know that we do not find any meadow near the shore line where there is

(Testimony of Paul A. Smith.)

marsh land. You would not say that marsh land is meadow land.

Miss Phillips: No. The witness said this morning that a certain symbol might indicate marsh or meadow, and I wanted him to explain that a little further so that the matter would be clear.

The Court: Is it the contention that there was meadow land here? [112]

Miss Phillips: I think not, your Honor. As I say, I thought the record was a little ambiguous and I wanted that matter cleared up.

The Court: Q. Meadow land would be higher land than marsh land, would it not?

A. Your Honor, there are certain sections of New Jersey that are known as meadow——

Q. Let us talk about San Francisco Bay and around San Francisco Bay. I have never seen any meadow land along the shore line of San Francisco Bay, that is, in proximity to marsh land. It may be that there is such.

Miss Phillips: As I say, your Honor, it is simply a matter of clarifying the symbols used on the map. That is all.

The Court: I don't think we can characterize the land around Vallejo or Mare Island as meadow land. That is marsh land, is it not?

Miss Phillips: The symbol used on the map is appropriate to either. That is all I wanted to clear up.

(Testimony of Paul A. Smith.)

The Court: I see. I don't know that there is any point to be made on that, or not. It seems to me that is marsh land.

Mr. Lipman: If I might offer the suggestion, your Honor, as a matter of law the patents are conclusive that everything in them was swamp and overflow land.

Miss Phillips: I just wanted to have the matter clear. I thought that the testimony the witness gave this morning required a little further explanation.

The Court: Very well. You may proceed.

Miss Phillips: Q. Mr. Smith, this morning on cross-examination counsel used the term with reference to some exhibit "extra high tides" and "higher high tides"; does the determination of mean high tide take into consideration extra high tides and higher high tides? A. Yes. [113]

Q. Is mean high tide the average of all high tides? A. It is.

Q. Including the extra high tides?

A. That is right.

Q. In determining a mean high tide line, are there any physical evidences on the land, itself, of any of the high tides?

A. You mean in general?

Q. Yes.

A. Yes, the storm tides are abnormally high tides and are generally indicated on flat land, such as marsh land or flat sandy beach, by a line of

(Testimony of Paul A. Smith.)

debris or driftwood that is cast up at the time of abnormally high tides.

The Court: Are we concerned with abnormally high tides?

Miss Phillips: The connection will be shown by my next question, your Honor. I mean to say that high tides take into consideration extra high tides. I want to ask the witness if there is any physical evidence of that that is recognized. I will ask the witness this question:

Q. Is there any physical evidence of ordinary high tide on the land, itself?

A. That is to say, you mean the mean high tide?

Q. Yes.

A. Yes, there is. In a sandy beach it is shown ordinarily by a closer packing of the sand, or by a discoloration of the sand. In marsh land, such as is under discussion here, it is shown sometimes by a characteristic stain on the grass, or by a difference in the slope of the land in that particular region, right at the plane of high tide. Where there are mud flats, it is shown by a difference in the size of the sun cracks that may occur between the tides. All those symbols are recognized by topographers.

The Court: Q. From your studies of the maps which have been introduced in evidence, is it your opinion that there have been great changes in the physical characteristics of the peninsula known as Mare Island?

(Testimony of Paul A. Smith.)

A. Do you mean, your Honor, of the whole thing? [114]

Q. Yes.

A. Yes, in that there have been dikes and such things put on. It is also significant that there is considerable accretion on the San Pablo Bay side.

Q. Is that accretion mud?

A. I have not made any personal investigation of that.

Q. What causes that accretion, if you know?

A. I should say that it is probably due to the breakwater that has been erected off the southeastern extremity, in part, and also in part due to the natural accretion in the currents that are known to exist in San Pablo Bay. It is rather a complicated problem.

Q. Where does the material come from that produces that accretion?

A. I should say that it comes from the rivers that flow into the bay at this point, and from Carquinez Straits.

Q. What river?

A. Napa River and the streams which flow into Carquinez Straits and empty in that vicinity; possibly some also from Sonoma Creek. That, however, is purely a speculation on my part, as I have made no study of the problem.

Q. I was wondering if those streams you mentioned could bring down any great amount of ma-

(Testimony of Paul A. Smith.)

terial that would produce any large amount of accretion there.

A. That could be determined, your Honor, from the studies that certainly must have been made by the United States Engineers of that region.

Miss Phillips: There have been studies made, your Honor. I tried a case just a little over a year ago in which just such a study was made.

The Court: Q. Naturally, those are very sluggish streams, are they not? A. I think so.

Q. If there were any accretions they would be such as would be produced by floods or a downpour of rain; in other words, it seems to me that all of those arms of the Bay are very sluggish and most of the sloughs are filled by the tides of the bay, are [115] they not?

A. Of course, wherever you have a current you have sediment being carried more or less in suspension; no matter how slight, it carries some. As you suggest, maximum accretion occurs probably at the times of floods.

Q. My questions are prompted by the statement made by you of the finding of sand or a sand bar near the shops on Mare Island. I was wondering where that sand deposit had come from, unless it was there long years before. Of course, we know that all around the bay here are sand dunes. Within a block of where we are now, or where the Civic Center is, in early days it was called the sand dunes, or the sand lots. It was covered with piles of sand.

(Testimony of Paul A. Smith.)

Even down as far as what we call the Emporium on main Market street were sand dunes. Where this building rests was at one time called a bog. It was considered rather low land here at the time this lot was sold. I can remember there was a great furore made that the Government was buying a bog rather than a lot on which a public building was to be erected. I am wondering whether the sand you found there could not have been produced maybe years and years ago, having a very remote if any connection with anything that is now before us.

Miss Phillips: I think there will be other evidence, your Honor, on the location of any stretches there, and their use over a considerable period of time.

The Court: Are there any sand beaches near Mare Island now?

Miss Phillips: Your Honor, the record will show better as to what I am now saying. The witness yesterday, in picking out the stretch of sand dune, did not place it at the machine shop—and I will ask counsel to correct me if I am in error on that. He placed it about here——

The Court: It was beyond that.

Miss Phillips: He placed the sand dune up in here. It is [116] marked "Y". There was a stretch of sand there. He did not undertake to say how far that stretch of sand was. He spoke of being on it and located unmistakable evidences of a beach.

(Testimony of Paul A. Smith.)

The Court: What is the significance of that?

Miss Phillips: It goes to show that this is land. If I can show that at the time the first commandant took possession of Mare Island he was hauling sand from these stretches to actually erect the first building on the island, I have shown land there—I have shown land and not sea.

The Court: Very well, you may proceed.

Miss Phillips: Q. Mr. Smith, I am going to ask you to make a comparison of the two surveys Exhibit L-6 and Exhibit L-14, Exhibit L-6 being the survey made by Rodgers in 1856, and Exhibit 14 being the survey made by Lawson in 1886, which was thirty years later. In the first place, were those two surveys independent surveys, or did one compile or use the work of the other?

A. The original survey by Rodgers was the first complete original survey of the region shown on that survey. The second is a re-survey by Lawson. From the only evidence on the sheet it was a complete and separate survey by him, what we call a re-survey of the area.

Q. I would like to have you make a comparison for the benefit of the Court of mean high tide line as shown on these two surveys in so far as the same shore line appears or was surveyed by the two men?

A. It is quite obvious without precise comparison by the use of tracings or otherwise that it is almost identical in the two surveys.

(Testimony of Paul A. Smith.)

Q. Is the identity of the shore line in those two surveys of any significance to you?

A. Yes, I think it is quite significant, especially in that it indicates that those two men who made their surveys with the original sheets of which we have copies [117] here there on the ground, and while they were making that survey and looking at that feature, must have had some very definite line which they have depicted on both of these surveys as the shore line.

Q. And there was a 30-year interval in between?

A. A 30-year interval in between.

Q. Referring now to the Rodgers Survey, Exhibit L-6——

The Court: Q. Are both of those Government surveys?

A. Yes, they are both Government surveys.

Q. Both independent Government surveys?

A. Yes; one of them was the survey by Rodgers in 1856, the second by Lawson, in 1886, both officers of the Coast Survey.

Q. You say they are independent surveys. Don't you suppose that Lawson used the notes of the other man?

A. Yes, your Honor, that is customary practice. He undoubtedly had that information at his disposal.

Miss Phillips: Q. Are they both plane table surveys?

A. They are both plane table surveys.

(Testimony of Paul A. Smith.)

The Court: Q. What does that mean, plane table surveys?

A. The plane table is a portable table mounted on a tripod, on which the original of that, of which this is a copy, was in the field, oriented, that is, it is moved so that the projection lines are north and south, east and west, in its true relative position on the ground, and then on that board with an instrument which they call an alidade, which is a telescope with a straight base, he makes his observations and measurements and plots them there on the sheet.

Miss Phillips: Q. If Lawson in 1886 found a material difference in the shore line, did the specifications of the Coast Survey in 1886 require him to plot it according to that difference that he then saw?

A. Certainly, and there are minor dif- [118] ferences that can be seen——

The Court: Q. What do you mean by "minor differences"? Point out some of the minor differences?

A. Particularly in this little isthmus, which seems to be the point of main interest right now, there are two small streams shown emptying into the Napa River side or Mare Island Straits side, and only one in a different location in that particularly narrow section.

(Testimony of Paul A. Smith.)

Miss Phillips: Q. Make your references to the differences quite specific, Mr. Smith, because the record does not show in which map you find the two small streams: is that in Rodgers or is that in Lawson?

A. That is in Lawson, in the 1886 survey.

The Court: Q. You say two slight streams or two small streams. How would you denominate those streams? What are they? Are they rivers, or sloughs, or creeks?

A. They certainly are not rivers. They are of the same nature as those features that you find even in the undisturbed sections today—slight sloughs. The fact that he shows them only in a single line would indicate that they are very narrow, maybe less than a yard or so. Of course, it is impossible to say the exact width.

Miss Phillips: Q. Have you other minor differences in mind?

A. Yes, there are slight differences in the ponds that are shown.

The Court: Q. Would they put on a map a slough that was only a yard in width? Would that be depicted, a slough that was only a yard in width, in marsh land?

A. Yes, it is quite probable. I would say that when you came to that, knowing how these surveys are made, and having made them, myself, if a man coming along could step across that slough it might

(Testimony of Paul A. Smith.)

not be shown, but if it is a little wider, or deep, it probably would be shown.

Q. It would be a very well defined slough?

A. It certainly would have well defined banks, something that would be worth [119] showing in that manner.

Miss Phillips: Q. Are there other minor differences you have in mind shown in the Lawson survey of 1886 not present in the Rodgers survey of 1856, or vice versa?

A. You mean particularly as to shore lines?

Q. Yes.

A. The shape of the more prominent slough, about 500 yards or 600 yards northwest of the narrowest part, is slightly different from that shown on the Rodgers survey; and in the same vicinity there are ponds. There are differences. Those are the ones I spoke of as minor differences. Grass growing outside of the main high water line is more of a major difference, I would say; it indicates that there is vegetation growing outside of the high water line that was not present at the time Rodgers made the survey.

Q. The grass you have pointed to appears on Exhibit L-14, the Lawson survey?

A. Yes, the Lawson 1886 survey.

Q. Referring to the Rodgers survey of 1856, L-6, I indicate to you the slough in the upper part of the map marked "Navy Yard Slough." What

(Testimony of Paul A. Smith.)

would be the source of the surveyor's use of such a place name as Navy Yard Slough?

A. It would be either from local knowledge which would be determined on the ground, or it may have been from the suggestion of the Navy Yard, proposed Navy Yard, on the southeasterly part of Mare Island. I don't know from any record what it is.

Q. But the name Navy Yard Slough appears on all of the subsequent surveys, does it not?

A. I believe it does.

Q. Do you know of any other name for Mare Island in use about 1850?

A. I believe Ringgold mentioned it in his sailing directions as Napa or Mare Island, lying in the northern part of San Pablo Bay, and I think he also gives the specific boundaries by streams. [120]

Q. I think I have his sailing directions here to which you refer. Are these Ringgold's sailing directions to which you refer? A. Yes.

Q. I think you might as well, as long as you have referred to Ringgold's name of Napa or Mare Island, perhaps we had better have it in the record instead of quoting from memory, the description that you have in mind.

A. Yes. This is a series of charts with sailing directions, embracing surveys—is it necessary to read all of this? It is quite lengthy.

Q. No. You have identified the sailing directions, and you said that Ringgold in his sailing di-

(Testimony of Paul A. Smith.)

rections uses the name Napa or Mare Island, and you have attempted to quote from memory how Ringgold described it. I just suggested, in having a quotation from memory, which might or might not be quite accurate, that you read the description.

A. He says on page 26: "At the head of San Pablo Bay, stands Napa or Mare Island, forming the strait and Bay of Napa in connection with a stream of the same name, which comes from the Suscol range of mountains, flowing through and connecting with Sonoma and Napa Valleys."

Q. Is there any other name for that island, any of the portion which you identified yesterday in Exhibit J?

A. There was one of these maps which had the name Isla de la Plana. It can be determined by referring to that.

Q. Are you able to interpret that?

A. I suppose strictly that is Island of Plain, Plain Island.

Q. In marking the name Mare Island on the headlands as indicated by counsel on cross-examination this morning, would the fact that the Navy Yard's activities were concentrated in this part of the island, around the head lands, be given any weight by the cartographer in the Coast Survey in placing the place name?

A. It would to this extent, that the nautical charts of the [121] Coast & Geodetic Survey are

(Testimony of Paul A. Smith.)

primarily for the purpose of navigation, and the fact that that is a prominent headland, as well as having a naval base thereon, may have had something to do with the placing of the name there.

Q. In placing the name "Mare Island" on the high land, did the cartographer at that time exclude the low land from being included geographically as being a part of that island?

A. No, the placing of the name, the name, itself, has nothing to do with the geographical feature as such.

Miss Phillips: That is all.

Recross Examination

Mr. Lipman: I have one further question, Lieutenant Smith: Looking at L-6 and then again at L-14, would you say that those two surveys indicate that the natural processes in the vicinity of the neck of which we have spoken and of the marsh lands to the northwest is one of filling in and filling rather than one of washing deeper?

A. I should say it shows silting in, with filling, accretion.

Q. In other words, those two surveys show that the natural process is one of accretion rather than one of cutting further and deeper?

A. In so far as the land is concerned.

Mr. Lipman: That is all.

Miss Phillips: That is all. Counsel at the noon hour indicated that he had two witnesses he would

(Testimony of George L. Cross.)

like to put on out of order, and I would be very glad to accomodate him.

GEORGE L. CROSS,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Where do you reside, Mr. Cross?

A. 322 North Broadway, Los Angeles.

Q. Did you ever live in the vicinity of Vallejo?

A. I did. [122]

Q. Did you ever know the land which is shown in Exhibit L-15 as Island No. 1? A. Yes.

Miss Phillips: I think it would help all of us if each time an exhibit is referred to you, as near as possible, give the date.

Mr. Lipman: L-15, which is dated 1915.

Q. When did you first know that land?

A. About 1896.

Q. At the time you first knew it were there any levees upon it? A. No.

Q. Will you state what the general condition and character of that land was at that time?

A. It was marsh and overflow land.

Q. Did you actually personally go on that land prior to the time it was leveed? A. Yes.

Q. How did you go on it?

A. I went on it with my father; I went up to take a look at it in a boat and got out at various

(Testimony of George L. Cross.)

places and rowed up the river, had a general look at it in different places.

Q. In view of the questions of the Court, was any of it meadow land at that time? A. No.

Q. Did you have anything to do personally with putting in the levees on that land? A. No.

Q. What was the name of your father?

A. Doctor L. E. Cross.

Q. Did he have anything to do with putting in the levees on that land?

Miss Phillips: Is the witness answering from his own knowledge? He has not so indicated.

Mr. Lipman: Q. Do you know whether or not, from your own knowledge, your father had anything to do with putting in the levees on that land?

A. Yes.

Q. What did he have to do with it?

A. He had everything to do with it, he owned the dredger and was leveeing the land for his [123] own purposes.

Q. Was the condition of the land prior to the time the levees went in such that the land could be used for agricultural purposes? A. No.

Q. Could it be used for pasturing stock?

A. No.

Q. Horses? A. No.

Miss Phillips: Has the witness indicated what land that is?

Mr. Lipman: Island No. 1. He is talking about Island No. 1.

(Testimony of George L. Cross.)

Q. What was that island known as when you first saw it? A. Island No. 1.

Miss Phillips: Objected to as leading, your Honor.

The Court: Overruled.

Miss Phillips: Exception.

Mr. Lipman: Q. During your residence in the vicinity of Vallejo did that island come to be known by any other name?

Miss Phillips: Objected to as immaterial, irrelevant, and incompetent, your Honor.

The Court: Q. You have not lived there for some time, have you?

A. No.

Q. You don't know what is on that now, do you?

A. No.

Mr. Lipman: I am only asking him if he knew what it was and if he knew it by any other name when he was there.

Miss Phillips: At what time?

Mr. Lipman: I will ask that question first.

Q. How long were you living in the vicinity of Island No. 1?

A. I lived there continuously from May, 1898 until the latter part of 1907.

Q. Did you live right on Island No. 1?

A. Yes.

Q. During the time you actually lived on Island No. 1 did it come to be called by any name other than Island No. 1?

(Testimony of George L. Cross.)

Miss Phillips: Objected to as immaterial, irrelevant, and [124] incompetent, and having nothing to do with the issues in this case.

The Court: Overruled.

Miss Phillips: Exception.

A. It became known as Cross Island.

Mr. Lipman: Q. While you were living there and when you first knew this land, did you also know the building at the Navy Yard which is called the steam engineering building? A. Yes.

Q. Referring now to Exhibit L-6, dated 1856, will you point out which building is the steam engineering building? A. Yes.

Mr. Lipman: The witness refers to a building which I will mark "Z".

Miss Phillips: Everybody seems to know where that building is, and I will stipulate now he has correctly pointed out the position of the steam engineering building. I think it is better not to put too many marks on the map if it can be avoided.

Mr. Lipman: Q. I will ask you if during the time you were living on Cross Island you knew the area which we have been talking of as the neck, which is a small area indicated as marsh land to the northwest of the steam engineering building.

A. Yes.

Q. What was the condition of that area when you first knew it? A. It was all marsh land.

Q. I will ask you whether you personally have

(Testimony of George L. Cross.)

ever seen the water clear over that neck of marsh land? A. Yes.

Q. How many times have you seen it that way?

A. Every high tide.

Q. By every high tide, now referring to months, how often each month?

A. Probably every day, high tide every day, extreme high tide.

Q. Do you know whether or not there appears during the month times at which the high tides are higher than at other times during the month?

A. Yes. [125]

Q. Are you referring now, when you say you have seen the water clear over at high tide to the periods of higher tide? A. Yes.

Q. What was the condition of affairs as far as water either being on or not on that neck at the time of high tide?

A. Once a day it was submerged.

Q. You are now referring to the area, let us say, between the letter "A" and the letter "C" on Exhibit L-6 of 1856? A. Yes.

Miss Phillips: Q. You say it was submerged every day? A. Yes.

Mr. Lipman: Q. Do you mean by that that it was wet by the tide, or that it was clear under water? A. The water covered it.

Q. After the levees were built which are shown on Exhibit L-15 of 1915, was there any road built

(Testimony of George L. Cross.)

from there southeasterly down to the high land of Mare Island? A. Yes.

Q. Who built that road? A. I did.

Q. When was it built?

A. About the year 1900.

Q. After the road was built have you ever seen the road, itself, under water? A. Yes.

Q. Frequently?

A. Well, at extreme high tide.

Miss Phillips: Objected to as leading and suggestive.

The Court: Overruled.

Miss Phillips: Exception.

A. At extreme high tide.

Q. After Island No. 1 or Cross Island was levied in and during the time you lived on it, what was it used for?

A. For general agricultural purposes, stock raising.

The Court: Q. How many acres under cultivation?

A. Well, we never surveyed it, your Honor, but as far as we could figure out by putting in the different crops, etc., I should say in the neighborhood of 7000 acres.

Mr. Lipman: The entire island indicated on Exhibit L-15 of 1915, within the levees, was used for agricultural purposes? [126] A. Yes.

(Testimony of George L. Cross.)

Q. That was so during your time on the island up until, I think you said, 1907, or 1908, when you left? A. Yes.

Q. Your house was actually on that island?

A. Yes, we had four of them.

Q. Was there a fence along the southeasterly end of the levee here?

The Court: Point it out on the map.

Mr. Lipman: On L-15, that is the point of the levee nearest to the high land of Mare Island?

A. Yes.

Q. Who put that fence in? A. I did.

Q. Why?

A. To keep our hogs and cows and stock from wandering over onto Mare Island Navy Yard and interfering with them.

Q. During the time that you lived on Cross Island, were you a voter? A. Yes.

Q. Were you registered? A. Yes.

Q. In what county?

A. In Solano County.

Q. Where did you vote?

A. I voted in Vallejo.

Q. Did you receive election notices through the mail? A. Yes.

Q. Did you ever serve on any juries in Solano County? A. Yes.

Q. Were you subpoenaed for that duty?

A. Yes.

(Testimony of George L. Cross.)

Miss Phillips: Just a minute. If your Honor please, I want to move to strike both the questions and answers directed to the witness with respect to his being registered as a voter while living on the island, serving on juries, and voting in Vallejo, on the ground all of that testimony is immaterial, irrelevant, and incompetent, not b ıding on the United States, and does not affect the title of the United States.

The Court: Motion denied.

Miss Phillips: Exception.

Mr. Lipman: Q. During the time you lived on Island No. 1, [127] was any portion of the Island No. 1 in the possession of the Government?

A. No.

Q. Was any portion of it being used by the Government? A. No.

Q. Did you ever hear anyone from the Mare Island Navy Yard make a claim to any portion of Island No. 1?

Miss Phillips: Just a moment, that is objected to as immaterial, irrelevant, and incompetent, not binding upon the United States, and not affecting the title of the United States.

The Court: Overruled.

Miss Phillips: Exception.

A. No.

Mr. Lipman: You may take the witness.

(Testimony of George L. Cross.)

Cross Examination

Miss Phillips: Q. How old are you, Mr. Cross?

A. I was born on September 30, 1874.

Q. So at the time, then, that you went to reside on the island you were 24 years old? A. Yes.

Q. What was your occupation at that time?

A. At the time I went there?

Q. Yes.

A. Well, I had just graduated from the University of California in 1898, and I really had no occupation at that time except to be my father's superintendent.

Q. You resided there from 1898 to 1907?

A. Yes.

Q. Have you ever resided in that vicinity, in the vicinity of Vallejo, since 1907? A. No.

Q. You went away for good? A. Yes.

Q. Did you keep a diary at that time, from 1898 to 1907—did you keep a day to day diary?

A. No.

Q. You stated in the course of your examination a few moments ago, when counsel asked you if you had ever seen the water going over the neck of land—you said you had seen it every [128] day. What were you doing down on that neck of land every day?

A. I knew it went over it, but I was not down there.

Q. You were never down there?

(Testimony of George L. Cross.)

A. Oh, yes, I have been down there when it was flowed over many times.

Q. I refer you now to your testimony when you were asked by counsel if you had ever seen water go over that neck of land, and your answer was you had seen it every day. My question is what were you doing down there every day that you could see the water going over that land every day? Do you want to correct your statement on direct examination? A. Yes.

Q. Very well, correct it. What did you mean?

A. Every time I happened to be down there at high tide I noticed the water running across the place.

Q. What was your business during the time you were there? How busy were you there while you were living on this tract of land which you have defined as about 7000 acres?

A. I was superintending the farming operations.

Q. Would you describe yourself just as a gentleman of leisure, much leisure? A. No.

Q. Quite a busy man?

A. Quite a busy man.

Q. Did you have time to go down there and watch the tide—for the purpose of watching the tide?

A. I went down there probably once or twice a week, and crossed that land to go to town.

(Testimony of George L. Cross.)

Q. You stated every tide. Your correction now is when you happened to be down there that it was flowing over the land? A. Yes.

Q. You did not mean to say you were down there every day? A. No.

Q. You are aware of the fact, are you not, Mr. Cross, that there are two high tides a day, I mean you are aware of the fact, are you not, that there are times of higher high tide, as compared with ordinary high tide? A. Oh, yes. [129]

Q. You are aware of the fact that sometimes there are extreme high tides? A. Yes.

Q. Did you ever make observation while you were down there in crossing to know whether or not you were crossing at extreme high tide or time of higher high tide?

A. We would not know whether at that particular moment we were crossing that neck of land that the tide was extreme high tide or an extreme low. You see there was a difference of about an hour between the San Francisco high tide and the tide in there, so all we could do would be to figure out; if it was high tide in the newspapers every day at a certain hour, say at 8:15 in the morning, it would be 9:15 up at our place, it would be high tide. We could tell, because our houses were located on sloughs, and we had a little wharf up there to get in at high or low tide with the boat, and we could tell on that wharf or by looking over

(Testimony of George L. Cross.)

the levee whether the tide was high or not; we knew all that land was leveed, and when it was high tide at our house or in front of our buildings it was also high tide at the Navy Yard, because all of that land was the same level all the way through; we would know if it was high tide at 11 o'clock in front of our house at night it would be high tide down there.

Q. I think we understand that. What I am getting at is, and what I was asking you about, Mr. Cross, was on the occasion when you would go down and across the neck of land at the time when you say it was high tide and the water up over the land, whether you knew that particular tide at that moment was a higher high tide as defined in the Coast Survey, or whether it was an extremely high tide.

A. Well, during each day there would be two tides, there would be a high tide—if you would say 6 feet 6 was an extreme high tide, there would be another one about 4 feet 6 that would be a high tide, there would be a difference between [130] the two.

Q. There was that difference as between the morning tide and the afternoon tide?

A. Not necessarily. It would vary during the day.

Q. Now, Mr. Cross, have you ever had any experience with the Coast & Geodetic Survey?

A. No.

(Testimony of George L. Cross.)

Q. Have you ever had any experience in the observation of tide? A. No.

Q. What I am getting at is this, at the time you crossed that island when it was covered by water, as you say, at high tide, do you know whether it was what the Coast Survey calls a higher tide or an extreme high tide? You say you crossed it at high tide, I am asking what high tide was it? Was it beyond a foot?

A. We could tell by looking at the marks whether there would be six inches of water over the top or two feet over the top.

Q. Have you ever had any training in the observation of tides?

A. Not any except what I had there.

Q. Then when you say the water was coming over at high water you really don't know whether it was a high tide which the Coast Survey would call a higher high tide, or extreme high tide?

A. No, I don't think I would.

The Court: Q. How did you cross from your place to the town?

A. We would take the ferry boat at Mare Island.

Q. You are talking about this land being under water. You would not sail a ferry boat on that land, would you?

A. No, we built a road, your Honor.

Q. You had a road? A. Yes.

(Testimony of George L. Cross.)

Miss Phillips: Q. You would get over to the Navy Yard wharf to take the ferry how, swim, or take a boat, or what did you do?

A. What do you mean, going over to Vallejo?

The Court: He said they had built a road across that narrow [131] strip.

A. We built a road across.

Miss Phillips: Q. You went down by foot, or team of horses? A. Both.

Q. What kind of a road was it?

A. It was made out of earth and covered with barnacle shells and cinders that we gathered up on the lower end of the Navy Yard.

Q. Did you build the road you made across the neck of land, yourself? A. Yes.

Mr. Olney: Along.

Miss Phillips: Q. Along?

A. Well, from that point where we had the fence and gate right over to the high land.

The Court: Q. How far was that?

A. About half a mile.

Q. Did that road ever overflow?

A. Yes, at extreme high tide I have seen water on it two or three inches deep, at extreme high tide.

Q. How high was that road above the level of the marsh land?

A. From about two and a half to three feet.

Miss Phillips: Q. You said, I believe, on direct examination, that there were 7000 acres up

(Testimony of George L. Cross.)

here in the place you have described as Island No. 1?

A. Yes, we figured in a rough way 4000 in this half, and about 3000 in this that was under reclamation.

Q. That is, the 7000 was from the point down here which we might say——

A. (Interrupting) Where the gate was, along here.

Q. Up to Napa Creek?

A. Up Sonoma Creek.

Q. When did you say you built that road?

A. About 1900.

Q. Did you get permission to build that road or did you just go ahead and build it, yourself?

A. We had permission from the Captain of the Yard.

Mr. Lipman: Q. What kind of permission did you have? A. Verbal permission.

Q. What was the permission to do?

A. To fix the road. [132]

Q. In connection with your farming operations in Island No. 1 did you also farm Island No. 2?

A. Yes.

Q. At the same time?

A. Well, I did not farm it, I had an elder brother that farmed it.

(Testimony of George L. Cross.)

Q. But during the time you lived on Cross Island, or Island No. 1, Island No. 2 was being farmed by your brother?

A. Yes, and then we later sold to a man named Hanbury.

Q. At the time your brother farmed it for whom did he farm it—for himself?

A. For my father.

Mr. Lipman: That is all.

Miss Phillips: That is all.

FRANK H. GREENE,

called for the Defendants; sworn.

Mr. Lipman: Q. Mr. Greene, where do you live? A. Los Angeles.

Q. What is your profession? A. Engineer.

Q. Were you ever employed at the Mare Island Navy Yard? A. I was.

Q. When?

A. From the latter part of 1897 until the early part of 1904, about six years.

Q. In what capacity were you employed at the Navy Yard during those years?

A. Well, when I went there I was called a draftsman—not a draftsman, but a transit man, and inspector, and at that time my duties were to supervise a dredging job being done by the San Francisco Dredge Company. Later I had various other jobs.

(Testimony of Frank H. Greene.)

Q. That dredging work was being done where, referring now to Exhibit L-6, which is a map of 1856?

A. Well, in front of the Navy Yard, clear down to here, this point, here, and across that bar.

Mr. Lipman: The witness indicates that section of Mare Island Straits from a point about opposite the steam engineering [133-135] building southeasterly down to Carquinez Straits, and along those straits southeasterly of the high land of Mare Island. A. Yes, it was.

Q. During the time you were employed at the Navy Yard, did you ever observe the area which we have referred to in the testimony as the neck of marsh to the northwesterly of the engineering building, being an area in and around where the letters A and C are, and northwesterly from that line and southeasterly from it?

A. I observed it a great many times without going onto the ground, itself, from the high land adjoining on Mare Island. I was there many times.

Q. What was its condition when you knew it?

A. It was marsh land. At high tides the water went over it. Most of it was covered with what we call tules, a kind of a weed that grows in salt water.

Q. I was going to ask you if you had ever seen that neck of marsh covered with water?

A. I have.

Q. How often?

(Testimony of Frank H. Greene.)

A. Well, many times, I don't know just how often. Every time I went up there in that vicinity at high tide there was water over it. Sometimes I was up there every day for a while, and then sometimes for a month I might not be near there.

Q. Can you state whether or not, to your own personal knowledge, at the time that you were at the Navy Yard the area in and around this neck was silting in?

A. Well, some of it I think was.

Q. During any of the time that you were there at the yard was any of the refuse or whatever it is called from the dredging operation dumped or placed in this area to the northwest of the steam engineering building?

A. Yes. The dredge was working along in this vicinity, abreast the steam engineering building, and there was a pipe line along here, and it discharged somewhere [136] in here, so that the material spread out in that vicinity.

Q. The witness has indicated that when they were dredging in front of the steam engineering building, and for some distance to the southeast of that the pipe ran across the high land on Mare Island in back of the steam engineering building, over to the swamp to the northwest: is that correct?

A. That is right.

Mr. Lipman: You may take the witness.

(Testimony of Frank H. Greehe.)

Cross Examination

Miss Phillips: Q. Was 1897 your first time at the Navy Yard? A. It was.

Q. And you were there until 1904?

A. Early in 1904 I left.

Q. And you have not been back since?

A. Not to stay there. I have stopped there occasionally.

Q. You have not resided in the vicinity since then?

A. No; the nearest was San Francisco.

Q. Mr. Greene, you said you had seen the neck of land covered with water many times at high tides; have you ever made any particular set of observations of the high tides in the vicinity of Mare Island at Mare Island Straits?

A. While I was there——

Q. Pardon me, my question is not clear. I mean scientific observations. A. Yes.

Q. By tidal gage?

A. By automatic tide gage.

Q. Where was that automatic tide gage installed?

A. It was located at what we call the ferry slip, in front of the Navy Yard.

Q. That was the Navy Yard tide gage?

A. Yes, the Navy Yard tide gage.

Q. Installed there for the purpose of observing tidal ranges: Is that right? A. Yes.

(Testimony of Frank H. Greene.)

Q. On the occasions which you say that you went over at high tides, would you be able to say now whether that particular occasion of high tide was a time of higher tides or a time of [137] extreme high tides?

A. Both of those went over, but it went over with the daily high tide, too.

Q. At any particular season of the year, or throughout the year?

A. In March, I believe it is, we have some extreme high tides, and also I believe in the latter part of the year, too. I have forgotten about those things. I know there are periods when we have an unusually high tide according to the position of the sun and the moon, etc. What I am referring to is the ordinary daily high tide. In extreme high tides the water got to a pretty good depth over it.

The Court: Q. Do you know how much spoil you deposited on that narrow neck?

A. I don't know. It has been a good while ago. The dredging job amounted to, if I remember right, something over two and a half million yards. There was quite a lot of it, probably several hundred thousand yards dumped over in that vicinity. It did not all stay there, of course, some of it floated away; how much of it stayed there I don't know.

Q. What do you call the material that you dredged?

A. Sometimes they call it slickings, when there was not much sand in it.

Q. Was there much sand there?

(Testimony of Frank H. Greene.)

A. In a good deal of the area there was very little sand.

Q. Mostly all slickings?

A. Mostly slickings. I would say that of the whole dredging job there must have been 80 per cent. slickings, the kind you stick in when you try to walk on it.

Q. Soft, oozy mud? A. Soft, oozy mud.

Miss Phillips: Q. You are referring now to the dredging job you were engaged on in the Straits, are you?

A. Yes, the material that was dumped over there.

The Court: Q. Who owned the San Francisco Dredge Company?

A. John McMullen was the largest stockholder in those days.

Q. Was Herman Krusi interested in that company?

A. Yes, I think [138] he was vice-president of the company. There was another man named Perry connected with it.

Q. Was Krusi ever there?

A. I think he was. He was up there a great many times in connection with the dredging. Just what interest he took in this neck of land I don't know, whether he ever went out and observed it much, or not.

Q. You knew him pretty well?

A. I knew him pretty well in those times, yes.

(Testimony of Frank H. Greene.)

Q. He was a very active, intelligent, observing man, was he not? A. Yes.

Q. I think he is still living over in Alameda.

A. That is what I heard sometime ago; I have not seen him in many years.

Miss Phillips: Q. Referring to the tides, at the time you saw high tide go over the neck of land, have you in mind any particular time of the day at which you saw that phenomenon there?

A. No; on the other hand, I would not have seen it ordinarily during only what was called working hours. Of course, as you know, the tide varies every day, it gets later every day. On one day high tide may be at eleven o'clock and in a week or ten days later it will be at seven or eight o'clock in the evening.

Q. Did your work confine your activities to any part of Mare Island Straits at any particular time? That is to say, did you do the upper part of the dredging in one month and then move on down to another part, or were you apt to be down at the lower end of the straits, near Carquinez, on one day and away up north the next?

A. No, it didn't work that way, the dredge didn't move that fast.

Q. In other words, you stayed at one place for some time until you dredged that part out and then you moved along: is that right?

A. Yes, very slowly. [139]

Q. Were you at this work all of the time that you were there?

(Testimony of Frank H. Greene.)

A. No, I did a great many other things. There were two or three different contracts, two different contracts that I remember of dredging while I was there.

Q. I got the impression from your testimony that your work was chiefly in connection with supervising dredging operations: is that correct?

A. It was when there was dredging going on, but when there was not the civil engineer dug up lots of jobs for me otherwise.

The Court: Q. How long were you on this job?

A. My recollection is the first job there was something over a year and a half steady.

Q. Steady work?

A. Yes, but I didn't do much of anything else except look after dredging. Then there was an interval between the next job came on when I did various other work.

Miss Phillips: Q. Were you a Government employee at the time or were you in private employment?

A. I was a Government employee all this time; I was never there in private employ.

Miss Phillips: That is all.

Mr. Lipman: No further questions.

The Court: That is all, Mr. Greene.

Miss Phillips: Your Honor, at this time I wish to offer in evidence, as Government's Exhibit next in order, I believe it will be Exhibit O, a photostat

certified copy made by the County Surveyor of Solano County, and now on file in the office of the County Surveyor of Solano County, as certified by the present County Surveyor, a survey of much of the land in controversy, and of the neck of land. It purports to show a survey made in 1854. The purpose of this survey is to show a survey of the land, and an attempt to patent it under a school land grant or [140] warrant which the County Surveyor floated and required to take lieu lands on the ground that the land in controversy was government land and Mare Island; this is a document of 1854. It is a public document on file in a public office.

Mr. Olney: It is simply on record there, is it not?

Miss Phillips: Yes.

Mr. Olney: I don't see that a claim of that kind made at that time is of any significance.

Miss Phillips: It is a public document from a public office. It is significant today as to what was Mare Island. This document has some significance.

The Court: You are offering it for what purpose?

Miss Phillips: I am offering it as evidence of a common acceptation as of the time at which the document was made, showing a recognition of this land as part of Mare Island, and it was being floated by the surveyor. Its evidentiary value may be slight. The objection on that ground would be simply a matter of the weight of the evidence.

The Court: Objection overruled.

Mr. Lipman: We have not had a chance yet to offer an objection, your Honor. I wish to offer an objection to it on the ground that it is immaterial, irrelevant, and incompetent, and very clearly hearsay.

The Court: Objection overruled.

Mr. Lipman: Exception.

(The photostat was marked "U. S. Exhibit O.") (Omitted, by designation, from this printed Transcript of Record.)

The Court: Does that refer to what you call the neck?

Miss Phillips: Part of it. If your Honor will look at the exhibit you will see that it refers to quite a considerable part of it.

The Court: You may proceed. [141]

Miss Phillips: I next offer in evidence as U. S. Exhibit P-1 a certified copy of a printed report of a Board of Civil Engineers for the improvement of Mare Island, made in 1873, commanded by Commodore Sanger, who was one of the original board which selected Mare Island as a site for the island. This is an official report made by Captain Sanger—he was Captain at that time—and his officers, made to the Navy Department, for the consideration of certain work which was proposed to be done. It is offered as an official report to show many of the conditions existing at that time on the island, and much of the land in controversy.

Mr. Lipman: I wish to object to the offer on the general ground that it is immaterial, irrelevant,

and incompetent. On the further ground that as to us the report is pure hearsay and it is self-serving. The report shows on its face that at that time there was a dispute as to whether this swamp land to the northwest, which we have been talking about, was or was not a part of Mare Island. Captain Sanger and his party represented the Navy Department, and were making this report on behalf of the Navy Department as an interested party. So we claim that even as an official report it is not entitled to be admitted in evidence, because it was not made at a time when there was no controversy over the facts which are here in controversy.

The Court: A controversy between whom?

Mr. Lipman: I don't know between whom. I can state as my statement, and not as evidence, of course, that Swamp Land Survey 569 was made in 1869. It was made upon a purchase by a man by the name of Hinckley. This report was made about four years after the survey had been made. I assume he was having a controversy with those claiming under the State. In any event, the report shows right on its face and in express words that there [142] was a controversy as to this very fact of ownership. This report is made in connection with the Navy, itself. It was the Navy, itself, that was making the contention that this was a part of the reservation and a part of Mare Island.

Miss Phillips: As to that, your Honor, I think that the latter part of counsel's objections go to the weight of the evidence. The point that the report, itself, is hearsay as to these defendants is, I believe,

met by the fact that there is a general exception to the hearsay rule. I do not understand that these defendants are in another category as to official records and documents. That is an admitted exception to the hearsay rule. The record is clearly admissible as a public record, as being the report of a public board. I may cite as to that Section 1888 of the California Code of Civil Procedure; Section 1918; Section 1926; Section 1870, subdivision 14; Section 1946; Section 1963. Those are the general sections of the California Code of Civil Procedure which specify the documents—the writings—which shall be considered public, and the circumstances under which they can be admitted in evidence.

Mr. Lipman: It is our position, your Honor, that while public reports are in general, as has been stated, admissible as an exception to the hearsay rule, that is not the rule when it is shown and when it appears that the people making the report were not equally disinterested as between the parties; particularly, your Honor, it does not apply when it is shown there was a controversy.

The Court: Do you claim, Mr. Lipman, that your predecessors in interest were parties to this controversy?

Mr. Lipman: I claim that the Government's claim that is shown in that report was a claim hostile to the claim of our predecessors in interest. This was made at a time when the [143] Navy Department was in controversy with our predecessors in interest as to what was and what was not a part

of the Government's Navy Yard. Surely, the Navy's officers saying between themselves, and from themselves to the Secretary of the Navy, We own it, is the purest kind of hearsay as to us, and cannot be binding on us.

Miss Phillips: I would say, your Honor, that every bit of that goes to the weight of the evidence.

The Court: It may be so. It may not have any weight, whatsoever. If it is a purely self-serving document and is purely hearsay, as Mr. Lipman says, the Court will not give much ~~weight to it.~~

Miss Phillips: Upon reading through it your Honor will see that aside from the statement of claims of title and of ownership, the board reports many conditions and facts and the results of some surveys. Counsel admits that public records and documents made in the course of official duty are an exception to the hearsay rule.

The Court: Would you say that the decision of this Board was a proper matter to be submitted here to the Court?

Miss Phillips: I don't think so. I think that parts of this are of greater evidentiary value than others.

The Court: Evidence that some board decided that certain land involved here was part of Mare Island?

Miss Phillips: I don't think it goes that far. In so far as the board gives legal opinions your Honor, of course, would not accept that at all. The evidentiary value of that would be nothing.

The Court: I will overrule the objection. It may go in for what it is worth.

Mr. Lipman: Exception. [144]

(The document was here marked "U. S. Exhibit P-1.") (Set forth in Vol. III, page 91, of this printed Transcript of Record.)

The Court: Strictly speaking, Miss Phillips, it seems to me that the objection to that evidence should be sustained. It may be that I do not see it clearly. I think the objection is good: I am permitting the evidence to stand, as I say, for what it is worth. As stated to Mr. Lipman, if it is deciding any controversy at all between the Government and the predecessors in interest of the defendants here, it certainly is not admissible.

Miss Phillips: When your Honor asked counsel to name the predecessors in interest, or the persons to the controversy, he was unable to name such a controversy. All he could specify was an inference that Swamp Land Survey 569 had been made and that somebody was claiming under that. I submit that it is rather a vague foundation for saying that two or three years later this was a factor in the report of a board for naval fortifications or for the development of Mare Island. The plan calls for that.

The Court: I will permit my ruling to stand, but I have my doubts about it. I merely wanted to express those to you. I intend during the trial to be very liberal in my rulings on the admission of evidence. It seems to me that the objection made

by Mr. Lipman in this particular is good. I am permitting my ruling to stand. I will admit it for what it is worth.

Miss Phillips: Your Honor, I will now tender and offer in evidence three photostat copies of maps made at the Island in the course of official duty, showing plans proposed and recommended by a Board of Civil Engineers on the Island, and accompanying the final report which has just preceded it.

The Court: What did that final report hold?

Miss Phillips: It is a plan for further development of the Island. In the course of it the Board reports conditions [145] about tidal observations, having no possible relation to a controversy. They are asking the Government to spend a lot of money. To show the natural conditions of the land I submit that when they are talking about building and the Government investing a great deal of money on the basis of certain developments when a board of competent civil engineers finds certain physical conditions I claim that it has certain evidentiary value, and that it is worthy of consideration by your Honor. It could not by any possibility be related to defendant's predecessors in interest.

The Court: Very well.

Miss Phillips: The three maps, as I say, are certified as copies of the originals. They are early maps, particularly two of them, showing conditions existing at the time.

Mr. Lipman: I object to the maps, your Honor, on precisely the same grounds as I objected to the

report itself. They are merely part of the report, so we wish to make the same objection.

The Court: Objection overruled.

Mr. Lipman: Exception.

Miss Phillips: The first and more general map, which is marked "Plan No. 1," I will ask that that be marked Exhibit P-2.

The Court: Is that a plan for a building?

Miss Phillips: No, it is a plan of the whole land. I will show it to your Honor. The maps go with the printed report, your Honor. The map which I have just tendered I ask to have marked U. S. Exhibit P-2. The two plans for construction work, in which I do not see a great deal of connection, but because they are part of the report I will ask that Plan A be marked U. S. Exhibit P-3 and that Plan B be marked U. S. Exhibit P-4.

Mr. Lipman: And it will be understood that our objection runs to all of these? [146]

The Court: Yes.

(The documents were here marked, U. S. Exhibits P-2, P-3, and P-4, respectively.)

(Omitted, by designation, from this printed Transcript of Record.)

Miss Phillips: The next exhibit I am going to offer in evidence will be a survey of Mare Island, made in 1876, by James Freeman. Attached to this exhibit is a file of documents. The first is Freeman's contract, dated June 28, 1876, to survey the exterior boundary of Mare Island. Attached to that

is his bond accompanying the contract, dated June 29, 1876. The official instructions given to him from the General Land Office, dated July 19, 1877. Accompanying his instructions for making the survey are the instructions from the General Land Office, showing a copy of the confirmation of the Land Commission and the District Court, and a copy of the registry entries in that case. There is also a copy of his field notes of the survey, showing completion in August, 1877; a notice of the plat and survey as advertised in the Vallejo "Evening Chronicle" and the "Alta Californian"; a letter from the U. S. Surveyor General of California, transmitting a tracing of the plat of the survey and Freeman's account to the General Land Office. Attached to that is a copy of the tracing of the plat to which the U. S. Surveyor General referred; a letter from the Commissioner of the General Land Office, dated November 16, 1877, showing approval of Freeman's account; then a plat of the Freeman survey, showing the certificate of the U. S. Surveyor General. There are three later letters, thirty years later, dated September 9, 1905, September 22, 1905, and September 28, 1905, from the Secretary of the Interior, the General Commissioner of the Land Office, and the Secretary of the Navy. The purpose of this whole exhibit, your Honor, is to show that in 1877 an authorized and competent surveyor went on the ground under the instructions of the Public Surveyor's Office to make [147] a

survey. The exhibit shows not only his instructions—and this is all matter of statutory requirement, your Honor, but his field notes and the plat he made, and the map he drew, and a chain of documents which we hold show as matter of law an approved survey.

Mr. Lipman: I object to the exhibit offered. I object to the Freeman Survey on the ground that we claim that it affirmatively appears that the Freeman survey was never approved, either as required by law or in any other manner. Many of the documents attached, in our judgment, show that it was not approved, and show that it was disapproved. Furthermore, all the letters and other documents attached, other than the survey, by which I mean the field notes and plat, would be admissible in evidence solely for the purpose of showing approval, if they did show approval; otherwise they are wholly immaterial in this case. We claim that those papers not only do not show an approval but affirmatively show that it was not approved. In this connection I wish particularly to call the Court's attention to the fact that the exhibit shows on its face that the survey was made under the Act of July 1, 1864. Under that Act the law specifically required of an approved survey made under that Act that the Commissioner of the General Land Office shall endorse his approval thereon, and there is no endorsement of approval thereon. So it affirmatively appears from the exhibit itself that it has not been approved in the manner provided by law, and that

it has no official standing as an approved survey. Therefore, it is wholly immaterial, irrelevant, and incompetent, to the issues in this case.

The Court: All of these documents you are now offering, Miss Phillips, were offered in the O'Donnell Case?

Miss Phillips: They were, your Honor.

The Court: Objection overruled. [148]

Mr. Lipman: Note an exception, your Honor.

(The documents were marked "U. S. Exhibit Q.") (Set forth in Vol. III, page 137, of this printed Transcript of Record.)

CARL A. CARLSON,

recalled.

Miss Phillips: Q. Captain Carlson, you have already been sworn and I think you stated your occupation yesterday as a Captain in the United States Navy. When did you join the Navy?

A. 1903.

Q. And you have been in the Civil Engineering Corps of the Navy during that whole period?

A. Yes.

Q. When were you promoted to the rank of captain? A. 1926.

Q. How many tours of duty have you had at Mare Island? A. Three.

Q. Will you state to the Court what those tours were?

(Testimony of Carl A. Carlson.)

A. In 1916 to 1919, 1924 to 1929, and 1934 t
the present date.

Q. Captain Carlson, you saw, did you, the ex
hibits which Mr. Smith identified this morning, be
ing drawings to scale of the early Coast Survey
several transparent maps later introduced into evi
dence? A. I did.

Q. Are you familiar with the map made by
James Freeman, which was a part of the exhibi
last in order, Exhibit Q, attached to this exhibi
and a part of it—are you familiar with that map?

A. I am.

Q. Have you had a transparent map prepared
upon the same scale as the transparent maps offered
in evidence this morning as Exhibits M-1, 2, 3, 4
and 5? A. I have.

Q. Is that it? A. Yes.

Q. It is made to the same scale as Exhibit M-1

A. Yes.

Q. For the purpose of fitting this map over the
Coast & Geodetic Surveys so as to have a com
parison of the shore lines? A. Yes. [149]

Q. Was this transparent map prepared under
your supervision and direction? A. It was.

Q. What have you to say as to its accuracy?

A. It is as accurate as the scale would permit.

Q. Do you believe it to be accurate?

A. Yes

(Testimony of Carl A. Carlson.)

Miss Phillips: Your Honor, I will offer this in evidence as M-7. It carries along the whole series of transparent maps under the same number.

(The tracting was marked "U. S. Exhibit M-7.") (Omitted from this Printed Transcript of Record)

Q. Captain Carlson, during your years in the Navy Yard, and particularly relating to 1916, when you first went to Mare Island, was sand used in construction work? A. The sand used——

Q. Answer "Yes" or "No." A. Yes.

Q. In what way and for what purpose?

A. At that time it was used for mortar, on similar jobs, road work and similar jobs that required sand.

Q. Was the use of sand required in any great quantity?

A. Any large quantity at that time was purchased.

Q. In what quantity would you say that the sand was used in construction work?

A. Five or six dump car loads a day.

Q. For how long a time were you using five or six dump cars a day?

A. Intermittently, perhaps one or two days during a week, very irregularly at that time.

Q. Did such use as that extend over the two-year period when you were there from 1916 to 1918?

A. Yes.

(Testimony of Carl A. Carlson.)

Q. What about your subsequent details in 1925 to 1929?

A. In 1925 to 1929 the available sand was very much reduced, and the labor involved in digging it out, it did not hardly pay to dig very much out. It was largely used for purposes like sand for the greens on the golf course.

Q. Was that an irregular use, again?

A. Yes. [150]

Q. Can you tell us something about the quantity? A. Not very accurately.

Q. Give us the best estimate you can. Would you say it was more or less than the use in 1916 to 1918? A. It was less.

Q. Was it continuous from 1925 to 1929?

A. Practically so.

Q. But in a lesser quantity weekly?

A. Lesser quantity, yes.

Q. Can you tell the Court where you went to get this sand? Let us use the two maps that are not pinned on the easel, that is, Exhibit L-15 and Exhibit L-6. Now, stand back so that his Honor can see. Whereabouts were you getting sand then?

A. What date is this chart?

Miss Phillips: I think this chart is about 1915, is it not?

Mr. Lipman: Correct.

A. Along in here.

(Testimony of Carl A. Carlson.)

Miss Phillips: Q. How long a stretch of sandy area were you utilizing? Could you give us an idea in feet? A. About a half a mile.

Q. Can you describe the character of this sandy area that you were taking sand from?

A. This sandy area was apparently an old sand ridge or barrier formed on San Pablo Bay on the Mare Island side, at the time before the days of hydraulic gold mining, and before there was any debris coming down the main river, and apparently the sand was good enough to use for building purposes.

The Court: Q. I suppose that any sand that was deposited anywhere about Mare Island was deposited before hydraulic mining commenced?

A. Yes.

Miss Phillips: Q. Would you say that this sand was clean in texture and appearance?

A. It was clean, but it was sometimes mixed up with tule roots and grass, but it could be easily screened and separated.

Q. You say for a distance of half a mile you used this sandy area? [151]

A. You understand we were working from the mainland north all the time. We had to go further and further along the ridge to get the sand, because we would take it out and leave holes where the sand was scooped out.

(Testimony of Carl A. Carlson.)

Q. Then when you scooped to a point that it was too hard to get you would move on further northward? A. Yes.

Q. You kept doing that? A. Yes.

Q. Could you tell whether there had been a prior use of sand before you came there in 1916? Did the land show a prior use?

A. The records of Mare Island—

Q. (Interrupting) No, I am asking you about what you saw, yourself, on the land. Did the land, as you saw it, show similar use before you came there had been made by prior civil engineers, etc.?

A. I could not state positively, it is so long back.

Q. That is so far as the location of the ridge of sand is concerned you might have been the first to use the sand there? A. Not at all.

Q. That is what I am getting at. That is what I meant for you to indicate, whether or not these ridges or dunes showed that they had been used when you went there.

A. Everything showed that they had robbed the dunes and ridges closer to the Island in the earlier days.

Q. You were proceeding northward from that. That is what I was trying to get at. I guess my question was not clear. A. Yes.

Q. Now, I am going to ask you to give us the approximate point of—the distance, let us say,

(Testimony of Carl A. Carlson.)

from the steam engineering building at the point where you began your use of sand—let us have the scale there, I think perhaps that would be better.

A. This is not good to use—we have better ones on the Island for this purpose—this is very general.

Q. Do not mark it. I want you to measure as near as you can from [152] the steam engineering building the point where you would say you began your use of sand in 1916, which was after previous uses. A. About three-quarters of a mile.

Q. Captain Carlson, are you familiar with the full extent of the island, let us say from the extreme southerly point of the head land, covering all of the high land and all of the neck of land?

A. I am.

Q. You are personally familiar with it?

A. Yes.

Q. Will you tell the Court whether or not there are any sand areas practicable to be used for such purposes as you have described in the area of the high lands? A. No.

Q. Is there any sand area? A. Not now.

Q. Not now? A. No.

Q. Let us go back, previous to that, in times past, have there been sandy areas in the high lands?

A. Undoubtedly, at the bottom of the cliff.

Q. Whereabouts would you say that there was sand areas in the high land areas? Will you indicate on the high land? Let us take the same exhibit, the map of 1915. A. There.

(Testimony of Carl A. Carlson.)

Q. May the record show the witness is now pointing to a stretch of land immediately beneath the contour line which, in turn, is almost directly across from the series of buildings. Can you identify the building up here to which you pointed as being back of this contour line?

A. About back of the main office building, where the low line runs up into the high land, the sand persists—I don't know just how far down, but certainly some distance here. That was in the early days.

Q. You would say that there were sandy areas then along this contour line here? A. Yes.

Q. When I first asked you the question whether or not there were any sand areas practicable to be used you said no. I then asked [153] you if there were any sand areas at all and you said yes. Were these sand areas you have described practicable to be used? Answer "Yes" or "No." A. No.

Q. Why not?

A. Difficult approach for the teams and sleds to get down to them, because there is a bluff there.

Q. Can you give us an estimate of how much of a bluff there is?

A. On that side of the island the land runs from 18 feet, and drops off a shelf, and then it gradually drops down to the lower end.

Q. When you give a bluff height of 18 feet which these sand areas touch against, have you in mind

(Testimony of Carl A. Carlson.)

any particular map or contour, or any exhibit in evidence?

A. The Sloat Board made a topographical survey of a portion of the island where it intended to locate the shop building, and in doing so it ran a series of levels north and south and transversely, and also took quite a number of levels at cross section intervals.

Q. Are those shown on the map which was identified by yourself yesterday as being found in the Navy Yard? A. They are.

Miss Phillips: That, your Honor, would be part of Exhibit F-2. F-2 would be the map which the witness is testifying concerning. The map will speak for itself.

Q. Is there any official record showing use of sand from early days in Mare Island construction work? A. We find——

Q. Is your answer "Yes" or "No"?

A. Yes.

Q. What records?

A. Entries in the log of Mare Island and also correspondence of the Yard.

Q. Referring now to the log of Mare Island, will you tell the Court what you mean by a log of Mare Island?

A. There was kept at Mare Island a daily log by the commandant, in which is entered the condition of weather and wind, and any notable event, such

(Testimony of Carl A. Carlson.)

as arrival and departure of vessels, and also what is going on in the way of construction work as the station was started. [154]

Q. Does it go into detail of construction work?

A. It contains entries about it.

Q. Is this the record which you had in mind when you said there were entries made from early days? A. Yes.

Miss Phillips: Your Honor, I have a series of such log entries photostated and certified as true copies of the log.

Q. Might I ask you if the log-book of Mare Island has been maintained from the time the first commander, Farragut, took command?

A. Yes.

Q. Is it maintained to-day? A. Yes.

Q. It is a day to day entry of the whole period?

A. Yes.

Miss Phillips: I wish to offer in evidence a few of these, your Honor. I want to cut down the record as much as possible.

Mr. Olney: What do these entries contain?

Miss Phillips: The entries show the use of sand, quantities of sand, in construction work, and in the two first buildings on the Island, which show the hauling of sand in very considerable quantities beginning in 1853, and persistently kept up for quite a period in early construction days. My purpose in that is evidentiary. It would show if you have the

(Testimony of Carl A. Carlson,)

hauling of quantities of sand for construction work from the region up here, and I am pointing now to the region above the narrow neck of land, it goes to show that you have the sand ridge not under water, but above mean high tide, in fact, probably above extreme high tide, where sand can be used and hauled from the neck of land for construction work over a very considerable period of time. It shows land. We are talking now about the boundaries of an island.

The Court: I understand. Have you got that evidence?

Miss Phillips: Yes, I have it here in the log. I have a great many log entries, and I want to eliminate all that I can for the purpose of cutting down the record. I offer now a record dated January 11, 1855. May I read this into the record, [155] it will save an exhibit:

"Cloudy cold day. Thermometer 40 degrees. Men employed as yesterday, except a sledge placed for hauling up sand from the beach."

I will leave out the remainder of it, because it is immaterial.

"January 12, 1855: Thermometer 45 degrees. Fine day, except that the wind is still from the East, blowing fresh. Men employed as usual. Commenced hauling up sand from the beach."

"January 13, 1855: Fine day, thermometer 44 degrees. Wind blowing fresh from the east and has

(Testimony of Carl A. Carlson.)

blown fresh all night. Men employed as usual on foundations and avenue. Carpenters on wharf and shed for carpenters. Hauling up sand from the beach."

Q. Captain, do the official records of the island show which were the first two buildings built?

A. They do.

Q. Which were the first two?

A. The building known as the forge shop, which is now the center of the yard, about opposite the administration building, and then the steam engineering building I think was second.

Q. The forge or smithy was the first?

A. Yes.

Q. And the steam engineering building, which has been identified several times in the record, was the second? A. I think so.

Q. Can you give us the year when the construction work began on those buildings?

A. The smithy bears the date of 1855 on its cornerstone over the main entrance. I don't know just the date it was started, but it was started certainly a year before that.

Miss Phillips: I have some other entries, I am afraid they are out of order. I do not want to take the time of the Court now, and I will put them in tomorrow morning. Might I say now that I can easily finish tomorrow morning, provided, however, Mr. Greathead, a witness whom I expected to call

(Testimony of Carl A. Carlson.)

after Captain Carlson, has recovered. He was here yesterday, but he was reported [156] as being quite seriously ill this morning. He is quite a material witness on one or two points, and I am a little fearful that he will not be able to come to court in the morning. His testimony would belong to my case in chief, I mean properly come in in the orderly manner of proof.

The Court: Perhaps he would feel better on Friday morning.

Miss Phillips: Mr. Lipman has just suggested it might be well for us to adjourn until Friday, with the idea that he would be here.

The Court: If that is agreeable to all concerned I will continue this case until Friday morning. Is that agreeable?

Mr. Lipman: Yes.

The Court: Very well, let that be the order.

(An adjournment was here taken until Friday, June 11, 1935, at ten o'clock a. m.) [157]

Friday, June 11, 1937.

Carl A. Carlson,

Direct Examination (Resumed).

Miss Phillips: Q. Captain Carlson, at the close of the session of the Court Wednesday afternoon I

(Testimony of Carl A. Carlson.)

had been questioning you about the use of sand in early days from the northern part of the area. Do you know what was the first improvement, if any, erected on the marsh northwesterly from the uplands after the Government took possession in 1853? I mean the marsh lands up there where it is known as Swamp & Overflow Survey No. 34.

A. There were some ranges put out for the Massachusetts to fire at.

Q. An artillery target? A. Yes.

Q. What is the basis of your statement on that?

A. The log at Mare Island has an entry about that.

Miss Phillips: Your Honor, may I read into the record—it will save filing an exhibit—from a photostat copy of the log the entry for June 4, 1855, the latter part of the entry, reading as follows:

"Placed a target on the island for the 'Massachusetts' to fire at, across the tule on the northern end of the island."

The Court: Q. Can you point that out on the map, Captain Carlson?

A. It would be some place along here, your Honor.

Q. What do you mean by "along here"?

A. I should estimate some 3000 feet or so above what we call the steam engineering building, somewhere in that general vicinity.

Q. 3000 feet?

A. I am just estimating that.

(Testimony of Carl A. Carlson.)

Q. That would be what we have been calling the neck? A. The neck, your Honor, yes.

Miss Phillips: And the entry also on June 5, 1855, at 1:20 p. m., reading as follows: [158]

"The Commandant"—that is Admiral Farragut—"went on board the 'Massachusetts' and commenced firing the starboard guns at the target-distance about 1100 yards. Found the bulwarks stood perfectly well except the nails drew in the middle of some of the planks on the outside, which are only 1-1/2 inch stuff. Firing well generally; any shot would have struck the hull of a ship but none struck the target."

Q. Captain Carlson, is there an automatic tide gage at Mare Island? A. Yes.

Q. Where is it?

A. It is at present located on the bascule bridge span. For a long time it has been located in the northern end of the Yard near what was called the steam engineering building in the old days. At one time it was located down near the ferry slip alongside where the building ways are.

Q. For how long a period has an automatic tide gage been in operation at the Yard?

A. I do not recall the exact date, but it must be now over fifteen or twenty years, anyhow. Of course, observations were made very early.

Q. Yes, Captain, but I am asking you now about the automatic tide gage. What is the mean high tide

(Testimony of Carl A. Carlson.)

as determined by the Mare Island automatic tide gage?

A. We used an elevation of 105.6. Just forget about the hundred and say 5.6 feet above the mean of the lower low water. Some five or six years ago we decided that this should be raised to 5.8, based upon a longer series of automatic tide gage observations.

Q. When you say "forget about the hundred," do you use the hundred, or do you use 5.6, or 5.8 to avoid the use of the minus sign?

A. Yes, that is the purpose.

Q. Captain Carlson, I am going to hand you three plates, and ask you if these three plates correctly represent the records of the automatic tide gage for the month of November, 1929, for the [159] month of February, 1905, and for the month of June, 1905. A. Yes, they do.

Q. Were those plates prepared under your supervision and direction? A. They were.

Q. Why was the month of November, 1929 selected to plot the tides for that month?

A. It was selected to give a representative or average monthly tidal record.

Q. Why was the month of February, 1905 selected?

A. That is one where there was higher water observed throughout the month.

Q. As being a month of high tides?

(Testimony of Carl A. Carlson.)

A. That is due to run-off in the rivers and what-not.

Q. And why was the month of June, 1905, selected?

A. June was selected because it is a month of unusually low tides.

Miss Phillips: Your Honor, I think the exhibits are explanatory and I need not go into detail about them. I offer the three plates as one exhibit and ask that they be marked U. S. Exhibit R.

(The plates were marked "U. S. Exhibit R.") (Set forth in Vol. IV, pages 21 to 25 of this Printed Transcript of Record)

Q. Do you happen to know, just as a matter of interest, what was the extreme of all the high tides that have been registered by the tide gage at Mare Island?

A. As I recall it, something around 9 feet plus; that is, 9 feet plus above mean lower low water at zero.

Q. Will you define the term "spring tide"?

A. The spring tides are the two high tides occurring at the time of full and new moon. It is generally just the day after.

Q. Is the spring tide a higher tide?

A. The spring tides are the tides twice a month when the moon is either full or new. That gives the highest range of high tides and low tides, I mean the greatest range.

(Testimony of Carl A. Carlson.)

Q. What is a neap tide?

A. The neap tides are just half way [160] between the spring tides. The neaps are half way between the others in time. Every quarter of the twenty-eight-day lunar month, roughly speaking, you have the spring tides and then you have the neap tides, and then you have the spring tides, and then you have the neap tides, and back again to the spring tides.

Q. What is the tidal range of the time of the neap tides? I mean is that higher, or lower, or what?

A. Well, at Mare Island it is——

Q. I don't ask for it in feet, Captain, I am just asking you to contrast them.

A. It is the lower.

Q. The neap tides are the lower high tides: is that right?

A. Yes; approximately speaking, the neap tides also refer to the low neap tides.

Mr. Olney: Q. Is it not an accurate expression to say that the range is less rather than lower?

A. Yes, the range of the neap is less.

Miss Phillips: Q. Are there any conditions at Mare Island which affect the height of the tide, other than the sun and the moon?

A. It is possible that the construction of dike 12 along the training wall and other spur dikes and the dredging of the channel, and the improve-

(Testimony of Carl A. Carlson.)

ment of the rivers have had some effect on the tidal range. Over a period of many years, though, that would not represent very much.

Q. Would conditions of flood, or the absence of flood in the San Joaquin or Sacramento or Napa Rivers affect the tides? A. Yes.

Q. Did you hear the testimony of the witness Cross the day before yesterday upon the building of levees and reclamation work which was done by his father and himself on the neck of land and the adjacent marsh north of it from the year 1898 to [161] I think he gave the date of 1904 or 1905, or somewhere along in there? A. I did.

Q. Will you state to the Court what is the effect of levees on land levels?

A. When lands of that character are enclosed by levees the natural replenishment of the soil, the silt, is cut off. The lands are exposed to the sun, the wind, and the air, and to a drying out effect, because they are not flooded as they would be normally, and over a period of years, depending on the character of the soil, they will shrink. Of course, that is a matter of variation in different localities. It has been observed and measured quite generally up in the Sacramento Delta region.

Q. What is the effect of building levees and draining land outside of the levees?

A. It depends upon the location of the land. We have found that where the levee runs parallel

(Testimony of Carl A. Carlson.)

to the shore line, we find the same condition of height of marsh, it builds up to the same height as it does normally without the levees on the outside of the levee.

Q. When, to your knowledge, was a contour map made of the neck of land and adjacent marshland, if it was ever made?

A. The first one that I have definite knowledge of is the one made in 1906.

Q. By whom?

A. By Civil Engineer Rousseau.

Q. Stationed there at the Yard? A. Yes.

Q. Is this the map to which you have reference as the contour map of 1906? A. Yes.

Miss Phillips: I ask that this be admitted in evidence, your Honor, and marked our Exhibit S-1.

(The map was marked "U. S. Exhibit S-1.")

(Set forth in Vol. IV, page 26 of this Printed Transcript of Record)

Q. Did you ever run any land levels in there, yourself, or have them run under your supervision?

A. Under my supervision a [162] field party took levels there in 1917 throughout the same general area.

Q. Throughout the same general area as the Rousseau map of 1906? A. Yes.

Q. Is this a blueprint of the contour map to which you refer that you had made, yourself, in 1917? A. Yes.

(Testimony of Carl A. Carlson.)

Miss Phillips: I ask that this be offered in evidence as our exhibit S-2.

(The blueprint was marked "U. S. Exhibit S-2.") (Set forth in Vol. IV, page 27 of this printed Transcript of Record)

Q. Did you ever run any levels in there subsequently, Captain, over the same area?

A. In 1931 I had levels run there immediately under my supervision.

Q. Over the same general area?

A. Over the same general area.

Q. Have you made a study of the Rousseau map which has just been offered in evidence as U. S. Exhibit S-1 and your own contour map of 1917, which is U. S. Exhibit S-2, and of the contours shown on your map of 1931? A. I have.

Miss Phillips: We have so many maps, your Honor, that I find I did not bring down that 1931 map, but I will produce it a little later.

Q. Was the plate which I now show you prepared under your direction and supervision?

A. It was.

Q. Did you utilize, in preparing that plate, Engineer Rousseau's contour map of 1906, your own contour map of 1917, and your contour map of 1931?

A. The 1931 map is, strictly speaking, not a contour map, it is a cross section through the same area.

(Testimony of Carl A. Carlson.)

Q. You took the contours?

A. We did not plot the contours; we plotted the cross sections; there is a technical difference there, but it is to the same effect.

Q. Did you also utilize the Coast & Geodetic Survey of Cutts and Rodgers of 1852 and 1856 in preparing this plate? A. I did. [163]

Q. I wish you would explain to the Court what is the diagram in the upper right hand corner?

A. The diagram in the upper right hand corner is marked, "Key plan of Sections," on which are horizontal lines indicating the stations by numbers at which the lines of levels were taken in 1931.

Q. That is, the plan in the upper right-hand corner is the land, looking at it flat, with specified points marked on it; is that right? A. Yes.

Q. What is the series of profiles that appear on the left of the exhibit?

A. The profiles, for example, starting at the north station 2, are shown in cross section here corresponding to the elevations we find on the 1931 series of levels, the 1917 and the 1906.

Q. That is, if I understand you, each point marked on the plan in the right-hand corner will show at the side the contours appearing at that place or station in the plan, and will show cross sections of the land: is that what you mean?

A. It gives the elevation as though you cut it with a knike vertically.

(Testimony of Carl A. Carlson.)

Q. How did you derive the dotted line marked 1931, which appears on each of this series of profiles?

A. By first locating the edge of the marsh according to the Coast Survey charts.

Q. Now, Captain, I am talking about 1931: How did you derive the 1931 series of profiles?

A. In 1931 we took levels right across the land.

Q. That is, you used the levels you took in 1931?

A. Yes.

Q. How did you derive the dashed line marked 17?

A. The dashed line was derived by drawing horizontal lines across the contour map of 1917 and getting an intersection of those with the contours; they were used as being the vertical elevation.

Q. You used that 1917 for getting the elevation at a particular point?

A. Yes, and the same method was followed in the case [164] of 1906.

Q. How do you explain the reduction in the land level there between 1917 and 1931? There is quite a substantial reduction in the level of the land, is there not?

A. There is evidence there of subsidence and loss of elevation due to the shrinkage that takes place within diked areas, depending upon the character of the soil and the vegetation.

(Testimony of Carl A. Carlson.)

Q. Had the Navy Yard done reclamation work in that district between those two periods, or previously?

A. For some time, that is going back, there has been a certain amount of filling from the high land north. Does that answer your question?

Q. Yes, the filled area probably shows on it. My question was had there been reclamation work done over this area by the contours of which you are showing the difference in the reduction of the land levels? A. First of all——

Q. You can answer it "Yes" or "No," Captain.

A. Yes.

Q. Would that explain the reduction in land levels? A. It would.

Q. Now, how do you explain the reduction in the land level there between 1917 and 1906. There is a reduction shown in that plate, is there not?

A. 1907?

Q. 1917 and 1906.

A. There is a reduction in some of the sections. In some of the sections hardly any, due to a certain amount of filling in part of the area.

Q. Does that exhibit and study of the cross sections show any unreclaimed marsh land outside of the levees?

A. It does; wherever the cross section surveys in 1931 were taken.

Q. Does the exhibit show the level of this unreclaimed marsh land above mean high tide?

(Testimony of Carl A. Carlson.)

A. It does.

Q. About what was the level?

A. It runs about two-thirds of a foot on the water side, the Mare Island straits side, and builds up to about 1.4 feet on the San Pablo Bay side.

[165]

Q. I am still talking about the same series of cross levels. My last question was directed to unreclaimed marsh land outside of the levees. When you speak about the level of the unreclaimed marsh land you refer to its height at the time that this plate was prepared? A. In 1931?

Q. Yes. A. Yes.

Q. From what source did you draw the continuous line marked 1852 in this series of profiles? How did you draw that line?

A. Knowing the present elevation of the marsh on the Mare Island Straits side, and on the San Pablo Bay side, and having the location which was established by the Coast Survey charts of mean high water the profiles parallel the 1906 profiles which are undisturbed.

Q. Let me see if I understand you: Starting with the fact that you assume to be true, that the marsh was above mean high tide? A. Yes.

Q. Now, what amount of that mean high tide did you take as a minimum amount which the marsh would be above mean high tide?

A. I took 2/3 of a foot.

(Testimony of Carl A. Carlson.)

Q. I want to ask you why did you take 2/3 of a foot as the least amount, the minimum which the marsh could be above mean high tide?

A. We actually found it by the survey and by also checking with the Sloat Board findings. They found the same average height along the marsh on the east side of the island.

Q. You are referring to the Sloat Board report which was put in evidence a day or so ago?

A. Yes.

Q. Starting with that assumption that it was that amount, did you then plot the 1852 line paralleling the line of it to Rousseau's contour line of 1906? A. I did.

Q. In making that plot did you apply any well-recognized or well-established principles?

A. I do not quite understand you. [166]

Q. In plotting the 1852 line.

A. You mean just the drafting of it?

Q. Well, you carried it along parallel to the Rousseau line. Are there any authorities on reclamation work that would establish the correctness of that method of plotting?

A. It is well known by those involved in the reclamation of marsh lands that after they are leveed and deprived of their normal tidal flow that they will consolidate and shrink, depending upon the character of the soil, itself. But I did not apply that in this case, because I just lifted the same cross sections.

(Testimony of Carl A. Carlson.)

Q. You found Rousseau had found a certain contour existed in 1906?

A. Yes, and I paralleled that at an elevation so that it would bring the marsh land up to the elevation of the water as we had already found it, ⅔ of a foot.

Miss Phillips: Your Honor, in reading over the transcript I find that I neglected to ask Captain Carlson a question the other day about his examination of the naval archives for a map. You located, Captain Carlson, as a part of the Sloat Board's report, maps A and B, and those maps were put in as part of the Sloat Exhibit. Did you find any of the Ring*gold* charts in the Navy archives?

A. In the Naval Library I found a publication of the Ring*gold* charts.

Q. And in the Naval Library were those charts originals or photostat copies, or what?

A. In the Naval Library they were the same publication that you have here now.

Q. Did you hear the estimate of the witness Cross as to 7000 acres in what he called Island No. 1? A. Yes.

Q. How near does that accord with your approximation?

A. What do you mean by No. 1?

Q. Well, he identified on this chart up here what he called Island No. 1, this whole area down here, he identified Island No. 1. [167] I am now pointing to Exhibit L-15. He said there was ap-

(Testimony of Carl A. Carlson.)

proximately 7000 acres in that. I just want to know if approximately that is correct, or if you would vary from that estimate?

A. I would think that is a great deal more than is actually in that area, because this area that he pointed out is the area diked off and shown in white, indicating that the flood waters are not allowed to flow over it by reason of the levees.

Q. Your estimate of that is what, if you have made an estimate? If you have not made an estimate you do not need to bother about it.

A. No, I have not, but I would cut it in two.

The Court: You said No. 1. Some of the maps show Island No. 1.

Miss Phillips: He referred to it by a name popular in 1900 or 1902; he knew this land marked in white as Island No. 1, and he estimated the acreage was about 7000 acres.

The Court: I heard that.

Miss Phillips: All I am asking the captain is what his estimate of that acreage is. If you have not had occasion previously to estimate it we won't bother about it.

A. It would be materially less, it would be roughly half.

Q. You have not had occasion to estimate it?

A. No, but I would say that just by looking at it.

Q. You were questioned yesterday about the sand ridge and the way it shows on the large aero-

(Testimony of Carl A. Carlson.)

plane map. Captain, I will show you an aeroplane map on a different scale, somewhat smaller. Do you know when this framed aeroplane map was made?

A. That was taken in the spring of 1931.

Q. Does the sand ridge show upon that photograph, and if so can you point it out to the court?

A. It does.

Q. How far up does it show?

A. It shows from this levee, that is a recent levee that we have built. [168]

Q. The witness now is pointing to a point immediately above the letter "M" as it appears upon the photograph. Will you trace it with your pencil?

A. About 2500 or 3000 feet north of the steam engineering building there was dredged material put in that basin, and you cannot see what is underneath. The sand shows very clearly, starting at that point, it shows here a series of pot holes where the teamsters excavated the sand to load the wagons. As you go further along you get to borrow pits. That is where they were still digging out sand at that time, and then it was carried right along to here and then here it shows plainly in this field, here, which is south of the Sears Point Road; this was a particularly favorable time for seeing it, because the vegetation is thin and the sand shows through it, and it carries on right up through here;

(Testimony of Carl A. Carlson.)

the sand shows plainly in the photograph up through here, the formation carries right along.

Q. Does it roughly parallel the greater part of this road which appears in the map?

A. It does roughly.

Miss Phillips: I would like to offer this framed photograph in evidence, your Honor. May I have the profile map? I would like to offer the series of profiles and cross section as an exhibit next in order, I believe that would be Exhibit T.

(The profiles are marked "U. S. Exhibit T.") (Set forth in Vol. IV, page 28, of this printed Transcript of Record.)

I will offer the photograph as Exhibit U.

(The photograph was marked "U. S. Exhibit U.") (Omitted, by designation, from this printed Transcript of Record.)

You may cross-examine.

Cross Examination

Mr. Lipman: Q Captain Carlson, referring now to Exhibit T, which is this sheet of profiles, what is the vertical exaggeration of the profile?

A. It is marked on the drawing, I think. It has two different scales. I could work it out if you wanted it [169] exact. The vertical scale is necessarily much enlarged in order to make the drawing —in other words, as long as this room.

(Testimony of Carl A. Carlson.)

Q. In other words, the vertical exaggeration is as much as ten times? A. I think so.

Q. Is it as much as twenty times?

A. That I could not say, but I could check it in a short time.

Q. I shall ask for a recess in a little while, and perhaps during that recess that can be done. The purpose of the vertical exaggeration is, is it not, Captain Carlson, so that these bumps and elevations can be shown, because if you put it on a map as small as this without vertical exaggeration you practically could not see the bumps at all: is that correct?

A. That is correct.

Q. I don't think you stated how much in your computation or judgment in feet or inches the shrinkage has been in this land, here, that is inside of the levees.

A. That can be measured from that scale, the vertical scale.

Q. Then during the recess I will ask that you make some measurements of that so that you can tell me that.

A. Might I say the vertical scale is given there, because it is given in relation to the tidal levels, and that gives you the scale right there.

Q. I cannot read it, so you will have to tell me what it is.

(Testimony of Carl A. Carlson.)

A. The vertical scale shows mean lower low water line, the mean high tide line; at each of the cross sections is a subdivision between the mean lower low water at zero and mean high tide at plus 5.8, and it gives it by foot intervals in between on each section, but the lower section is an enlarged section at station 2. The large scale was to show the separation of the levels clearly.

Q. I understand; you are saying to me that you can compute from this chart what the shrinkage has been. A. Yes.

Q. But I want to ask you to actually make a computation at some of [170] these sections and tell me what it is, and I will suggest that you can do that at a brief recess which I will ask for, and at the same time you can check what the vertical exaggeration there is. Now, Captain Carlson, are you familiar with the present navy yard fence that exists, let me say, to the south or southeast or southwest of the Sears Point Toll Road?

A. I am.

Q. When was that fence erected?

A. That fence was erected about 1914.

Q. By whom?

A. The fence was erected by the Navy Yard.

Q. Has it been maintained by the Navy Yard ever since?

A. I am quite sure it has been.

Q. Now, you stated that some material was obtained from the Coast Survey charts of Cutts and

(Testimony of Carl A. Carlson.)

Rodgers in making your Exhibit T. You did not find any marsh elevation on either of those surveys, did you? A. Not that I can recall.

Q. Your estimate that the marsh was ⅔ of a foot above the mean high water line was arrived at from the fact that on one of the Sloat Board maps they showed some elevation that high in the marsh on the easterly side of the Island opposite Vallejo?

A. Yes, they also said in effect that taking a boring at the edge of the marsh the elevation for the marsh was that I call ⅔, .67.

Q. Did they show any actual elevation in the neck on their drawing? A. They did not.

Q. So you merely assumed that if the marsh on the east side was ⅔ of a foot above perhaps the marsh at the neck was the same?

A. At least that.

Q. That is just your assumption?

A. Yes, based upon a good deal of knowledge of all of that area.

Q. But, of course, you have no knowledge, yourself, of what the conditions were in 1852, nor does the Cutts map or the Rodgers [171] map show any actual elevation, so that it is a mere matter of deduction, as I understand it?

A. They show the shore line.

Q. Oh, yes.

A. And they also show the formation along there.

(Testimony of Carl A. Carlson.)

Q. Let me put it this way, suppose the neck at the time Cutts made his survey had in fact been three inches above the mean high tide line, his map would have shown it the same way, would it not?

A. Probably.

Mr. Lipman: I wonder if we can have a five-minute recess?

The Court: Yes, we will take a ten-minute recess.

(After recess:)

Mr. Lipman: Q. Captain Carlson, have you, during the recess, had a chance to compute the vertical exaggeration on Exhibit T?

A. Yes; the scale is about 7½ feet to the inch vertically; the horizontal scale is 300 feet to the inch. It is given here by station marks.

Q. What does that make it; how many times is the vertical exaggeration?

A. It would be 300 divided by 7½.

Q. Which is what? A. About 40.

Q. In other words, the exaggeration there is 40 times, in order to give a line that shows sizable ups and downs? A. It is.

Q. Did I understand you correctly—I thought I understood you to say that the marsh outside the levees had the normal accretions that the land had prior to reclamation; whereas the land inside the levees has done the shrinking. A. Yes.

Q. Can you state whether or not the natural condition there is one of accretion?

(Testimony of Carl A. Carlson.)

A. At the present time it is one of accretion, due to artificial works.

Q. Prior to the artificial works that would cause that, what was the process?

A. I have no knowledge as to that.

Q. You don't know? A. No.

Q. You were asked a good deal about the digging of sand. Of [172] course, the sand that was dug away back when Admiral Farragut was there you know nothing about, other than from the log-books of the Navy Yard. Is that correct?

A. No. The records by the men who worked on the Yard describe the sand right along for years.

Q. What I want to get at is this: You have never seen anything on the ground, yourself, that you thought you could identify as digging back in the '50s, did you? A. No.

Q. In regard to the silting-up, you know, of course, that during hydraulic mining days a vast amount of detritus came down the rivers?

A. Yes.

Q. And you know that that caused silt in this area, as well as in other areas, don't you?

A. Yes.

Q. So that the process in and around the Mare Island region during those days, in any event, was certainly one of silting, was it not?

A. In certain places, yes.

Q. Let us take some of the marsh we are talking about; is it your belief that the marsh land

(Testimony of Carl A. Carlson.)

along the San Pablo shore from, say, the end of the Mare Island high land in the region we have called the neck was silting?

A. I believe so.

Q. And also on the Mare Island Straits side?

A. I could not say definitely on that.

Q. Has the entire neck, as we call it, been reclaimed today? Are there levees today on both sides of the area between what was the steam engineering building up to the Navy Yard fence?

A. Yes, practically the entire area in the center, that is between the old shore lines, has been leveed and we used it for putting in our dredging spill, as a settling basin to maintain the channel. On the tide lands a certain amount has been leveed. There are parts of it that have not been filled in.

Q. Referring now to Exhibit L-6, which is the 1856 Rodgers survey, [173] that area that is shown as the neck of marsh has been reclaimed today, has it not? A. I believe so.

Q. Was that the situation in 1917 when you took your levels?

A. Yes—excuse me, I will modify that. Not all the areas have been reclaimed. The degree of reclamation is shown in detail in these diagrams. This table gives the exact condition. I cannot say offhand just what it is.

Q. Let me ask you the question this way: Could anyone go on the ground today and see any land in

(Testimony of Carl A. Carlson.)

its virgin condition upon the neck that is shown on Exhibit L-6?

A. Not generally speaking of the neck up to the Sears Point Road—is that what you are speaking of?

Q. Yes.

A. I think all of that has been diked. There may be some land on the fringes——

Q. Let me put it this way: Substantially all that neck had more or less material put on it by artificial means?

A. Yes, but not in 1917.

Q. What was the condition in 1917?

A. That has been worked out on the contour map and the profiles; it has been worked out very carefully, having that in mind.

Q. Referring now to your contour map, which is Exhibit T, were the first 3000 feet northwesterly from the steam engineering building reclaimed in 1917?

A. I would rather testify with the map before me.

Q. All right, take the map. Is this the map you are referring to?

A. The contour map is the one to use. I can take it from that much quicker. It is Exhibit S-2.

Q. You are now measuring, are you, on Exhibit S-2?

A. Yes, and you are asking about 3000 feet northwesterly from the steam engineering building, are you?

(Testimony of Carl A. Carlson.)

Q. Yes.

A. At that line 3000 feet in a northerly direction, [174] and possibly parallel to the shore line, we find starting from the San Pablo Bay side a levee in place which was built before my time. We cross that levee and we strike the levee some 1600 feet east toward Mare Island Straits, then we hit apparently a junction of a smaller levee running somewhat south and east toward the Mare Island channel; at that time the area between the west and east levees had not been filled in.

Q. How about the land between what you have described as the easterly levee and the steam engineering building?

A. A certain amount of waste from dredging operations had been spilled in this corner, and to a certain extent filled in part of this area to certain elevations. That is developed on the cross sections, it is noted there, it states it there.

Q. The purpose of Exhibit T and the showing of cross sections is merely, as I understand it, to show graphically what the effect has been of the artificial works which are depicted: is that correct?

A. It is more than that.

Q. What is it?

A. In about 1927 or 1928 the commandant of the Navy Yard was served in a suit of ejectment by the Sheriff of Solano County, to eject him from a part of Mare Island; that was naturally a disturb-

(Testimony of Carl A. Carlson.)

ing thing, and it became my duty to make a thorough investigation of this problem from the physical standpoint, that is, to find out what actually had been the conditions in the early days, and how these later developments came about.

Q. For instance, you have testified that the land within the levees shrank, and that the land outside did not; that is merely to show, as I would gather, what physical works have been placed there and what the effect of those physical works has been, based upon showing what the conditions were prior to those works?

A. It gives a comparison between the areas that were leveed at different times and their behavior over a period of years. Hav- [175] ing the survey in 1907, you will notice on those cross sections that in certain places more or less there is a greater loss of elevation between 1906 and the 1917 survey.

Q. By the way, Captain, have you taken any one of your cross sections there and computed in feet what the loss was?

A. Starting with Station 2 at the top and going 300 feet from the horizontal base point of measurement with the sand ridge, from 1906 to 1917 it scales 1.2; from 1917 to 1931 it scales about .6.

Q. And that cross section is the first cross section southeasterly of the Navy Yard fence?

A. Yes, in fact it cuts a corner of it.

Q. It cuts across the fence? A. Yes.

(Testimony of Carl A. Carlson.)

Q. Have you made a similar computation for the one marked 34, or for the one marked 48?

A. I will do so.

Q. All right, take 48, because that is right in the neck. We are now referring to U. S. Exhibit T.

A. At Station 48 the 1906 line is below the 1917.

Q. That means an accretion, does it not, or getting higher rather than lower?

A. Getting higher. Station 48 shows an abnormal elevation due to artificial fill; that is where that comes from.

Q. You have not any measurement at Station 48 showing what the natural condition was, have you, as to either shrinking or filling?

A. No, except the 1906 line is one of the regular elevations, I believe.

Q. Let us take Station 34: tell me what has happened at station 34.

A. Station 34 gives the 1906 line above the 1917. The loss in elevation is a full foot through the center of the sand ridge, and about half a foot some 200 odd feet easterly, and it is about a foot again here, and in one place here it is a little over a foot.

[176]

Q. In other words, at station 34 the 1906 line is above the 1917 line a matter fluctuating from a foot down to half a foot and back to a foot or so again? A. Yes.

Q. At what station on all of these elevations is the greatest shrinkage shown?

(Testimony of Carl A. Carlson)

Miss Phillips: That will require quite an elaborate computation, will it not? Is not that apparent on the exhibit, itself?

Mr. Lipman: I want him to pick out what he considers the greatest shrinkage, here. Let us find out what that is.

A. 1917, station 6 plus 20 and going east 1200 feet, it is about 1.2 feet, or 1.1 feet.

Q. Referring now to station 6 plus 20 on Exhibit T, and to the almost easterly portion of that cross section, you have indicated here a dotted line marked "Levee." A. Yes.

Q. Apparently outside the levee there is a shrinkage between the line which you have designated 1852 and 1906: Does that represent an observed shrinkage outside the levee?

A. I could check that from the elevations on the plan. Have we the 1931 map?

Miss Phillips: That is the one I explained that we did not bring, Captain. That is the one I spoke about this morning.

Mr. Lipman: Might I suggest that Captain Carlson do that during the noon recess and we can ask him that question after the noon recess?

Miss Phillips: I am not sure that that map is here. There were so many maps to bring down that that one might not have been brought down. I looked for it this morning. It may still be at Mare Island. We will ascertain that during the noon recess.

Mr. Lipman: Yes, may we suggest that the captain see if he [177] has it here and if he has he can tell us about it after the noon recess?

Miss Phillips: Yes.

Mr. Lipman: I have no further questions.

PAUL A. SMITH,

Recalled for the Plaintiff.

Miss Phillips: Q. Mr. Smith, you are still under oath, and your previous oath is binding upon you. You heard the testimony of the witness Mr. Cross the day before yesterday that he saw water standing over the neck of land about 1900 and thereafter, that he thought every high tide covered the neck at that time. I am not quoting the witness exactly, but I think that was the substance of his testimony. Have you an opinion as to whether such a condition existed in 1856 or in 1876, or in 1886?

A. I do not think that that condition existed as shown by the data that was taken by the Coast & Geodetic Survey under those dates.

Q. Why not?

A. In the first place, you have the shore lines shown as continuous on both sides of the neck. In the second place, the soundings that were taken by hydrographers, both in Mare Island Straits and in the San Pablo Bay side of the neck, indicate a continuous smooth low water line without any in-

(Testimony of Paul A. Smith.)

dentation there that one would naturally expect to find should the water have flowed over that neck of land at every high tide.

Q. That is, there would have been evidence of a water course, in your judgment?

A. I think there would have been.

Q. What percentage of high tides is higher than mean high tide?

A. Approximately 50 per cent.

Q. What is the transparent sheet which I now hand you which is mounted in a blotter for protection?

A. That is a tracing of a [178] photographic reduction of the two surveys, Cutts and Rodgers, of 1856 and 1886, made under my personal supervision at the Navy Yard on June 10, 1937, of the shore line of those surveys.

Q. Let us see what you did. You took the shore line of Rodgers of 1856 and the shore line of Cutts in 1886?

A. There should be a correction, that should be Lawson.

Q. As shown by the two surveys, and then you plotted on that transparent sheet?

A. Yes, they were traced.

Q. How did you indicate the two shore lines? Is there any difference in color there? Show his Honor.

A. The black shore line is from the survey of 1856 by Rodgers, and the red shore line is from the survey by Lawson in 1886.

(Testimony of Paul A. Smith.)

Q. Will you explain for what purpose that tracing of the two shore lines can be used?

A. That was made for the particular purpose of comparing the two surveys to the aerial photograph which we have.

Q. That is, the two survey lines can be compared with each other and then, in turn, compared with the photograph: is that right?

A. That is right.

Q. What is that photograph which I now show you?

A. I wonder if we cannot remove these other exhibits?

Q. I think so. We will very probably tear them if we do not. I am handing the witness now a large aerial photograph. The aerial photograph you hold in your hand unframed has what relation to the large framed aerial photograph in evidence as Exhibit 1?

A. This, as I understand, is a photographic copy of the photographic mosaic which is on the easel.

Q. Is it on the same scale?

A. No, it is slightly reduced. The scale, however, of this one is shown in the title, which has also been photographed.

Q. What is the scale of the photograph you now hold in your hand [179] as compared with the transparent sheet with the two tracings upon it?

A. They are the same scale.

(Testimony of Paul A. Smith.)

Q. Will you explain to the Court how the photograph and the two transparent sheets can be used?

A. These, your Honor, are used in a similar manner to the transparent sheets in the fundamental drawings which we had in court several days ago. In these there are two points on the transparent tracing from the original surveys, which can be identified exactly, the first one is the machine shop and the other is the very definite shore line at the southeasterly extremity of Mare Island. When those two points are superimposed, the fidelity with which Rodgers located the streams in the tule land of Mare Island is quite apparent. It also shows how little some of those streams have been changed from the time the original survey was made in 1856 to the present time, some 80 odd years later. It also indicates about where the artificial reclamation was made, just about the mean lower low water line of that date; along the Mare Island side is the land just above Boat Cut-off. The most interesting thing to me is the very close correlation between their shore line, particularly along the San Pablo Bay side of this isthmus, and what I personally identified on the ground as this sand ridge, which is in the proper relation to the shore line to have been the barrier ridge behind a beach of that nature, a little less than 100 feet back from the shore line as surveyed by Rodgers.

Q. Mr. Smith, you expressed the opinion the

(Testimony of Paul A. Smith.)

other day in answer to a question of the Court as to that sand ridge, that in your opinion it might be a storm barrier. Do you recall what that opinion was? Do you recall what you stated in that regard?

A. I do not recall the exact words; however, that is a very common feature found on a beach, just as it exists there on the San Pablo Bay side of Mare Island, where there is a long reach of [180] water, a long fetch of water where the waves will break on such a beach and build up with a slight sand barrier.

Q. Does the sand barrier just mark the height of a storm tide?

A. Not necessarily, but sometimes it does. In this case it might have. There is no evidence there except that it was a definite sand ridge lying about that distance back of the shore line.

Q. After making a comparison of the transparency with the photo—did you go on the ground and check it? A. Yes.

Q. What did you find?

A. I went down the ridge, I think you call that point——

Q. Sears Point?

A. The Sears Point Road to the intersection of that road, with the evidence of the old sand ridge, and it is quite apparent across the field, that the rise above the general cultivated part of the ridge is approximately one foot to two feet, and

(Testimony of Paul A. Smith.)

it is lighter colored, perceptibly so in the field, and the crescent shaped line extending to the northwestward can be seen for as much as half a mile in that portion to the northwesterly of that road.

Miss Phillips: I will offer, your Honor, in evidence the aerial photograph as our exhibit next in order, V-1.

(The photograph was marked "U. S. Exhibit V-1.") (Set forth in Vol. IV, page 30 of this printed Transcript of Record)

I offer the transparent sheet with the tracings as Exhibit V-2. I am going to ask that they be retained in the folder, as I think the exhibit could be torn and the ink could easily be erased.

(The documents were marked "U. S. Exhibit V-2.") (Set forth in Vol. IV, page 29 of this printed Transcript of Record)

A. I should mention that in handling that care should be taken not to rub one's finger over the ink surface.

Miss Phillips: You may cross-examine.

Cross Examination

Mr. Lipman: Q. When you were asked with regard to Mr. [181] Cross' testimony my recollection was that on cross-examination he corrected his original testimony and testified to the effect that he had not seen it every day at high tide, but that

(Testimony of Paul A. Smith.)

he had been there at times of high tide and did know how high it was, and had seen water over the land. I think I asked you on cross-examination whether there was anything on either the Cutts' survey or the Rodgers survey, or with regard to the Lawson survey, that would indicate that at times of higher high tide the water could not go across there in a sheet. I want to now ask you again is there anything on any of these charts that indicates that at times of higher high water the water could not have gone across that in a sheet?

A. No, there is nothing on these sheets to indicate that.

Q. Is there anything on any one of these maps that you have testified to up to the time of artificial reclamation that shows that that condition could not have occurred?

A. There are no elevations given in that neck of land, on any of those surveys, and there is no definite information that states on any one of those surveys that that could not occur, but I should say that such a definite shore line as confirmed by those two men would lead me to believe that such a condition probably could not exist at mean higher high water which is only half a foot above mean high water.

Q. You say mean high water. I am talking about times of very high tide.

A. Did you mention half a foot in your question?

(Testimony of Paul A. Smith.)

Q. No, I did not say anything about it. All I asked was when the tide was very high. I am now talking about above mean high. Is there anything on any of these maps that indicates that that water could not go across in a sheet?

A. There is nothing on the chart.

Q. Is there anything, in your opinion, that indicates that at times of very high tide the water did not go across in a sheet? [182]

A. Is there anything that indicates that on any of these exhibits that we have looked at, do you mean?

Q. I do not think it happens to-day.

Miss Phillips: Just a moment, counsel asked the witness a question and the witness asks counsel a question.

Mr. Lipman: That is all right, I am going to talk about any of the Coast Survey charts or surveys. Was there any Coast Survey chart prior to 1900 which indicates to your mind that at times of very high tide—what I am talking now about is above the mean high water, the water could not have gone across what we have called the neck?

A. I believe there is one of these charts, the engraved chart—you would have to refer to that exhibit—that indicates a white unbroken section through the neck—I think this one right here, but this chart is 1915—that indicates it is possible—

Q. I am talking about 1900.

(Testimony of Paul A. Smith.)

A. I do not recall anything.

Mr. Lipman: That is all.

Redirect Examination

Miss Phillips: Q. Mr. Smith, Counsel cross-examined you a moment ago and I have forgotten the exact question, but you indicated, if I recall it correctly, that at the mean of the higher high water you did not believe a sheet of water would go over that neck of land. Counsel dropped the question and I am not sure that I understood you. Would you explain what you meant by that, if I understood you rightly, and if I did not understand you rightly let us have your explanation.

A. I think it should be indicated that it is impossible for us to compare these old surveys in a quantitative manner so far as elevation is concerned across that neck of land, and the only thing that can be said about them is that when such a surveyor, such a topographic surveyor going along the shore line, two of them, thirty years apart, [183] certainly would have located some point there that would have been not just two inches, or three inches, or six inches above the mean high water, but a considerable distance, let us say at least a foot, and that is further confirmed by the elevations I understand the Navy Yard has taken on what is now exposed of that sand ridge which is on that datum 107 feet; that means the top of the sand ridge would be 7 feet above mean lower low water. Now, we

(Testimony of Paul A. Smith.)

know that the mean high tide is 5.8, according to the Navy Yard records, above mean lower low water, which means that the top of that sand ridge which we have identified as being about 100 feet inshore from the shore line as determined by Rodgers would be 1.2 feet above the plane of mean high water, or above the shore line of the Coast & Geodetic Surveys of 1886 and 1856. I think that clears up that point.

Q. When you speak about locating a shore line two or three or four inches, you express the opinion that it must have been a foot above—it would be a foot above mean high water. Why did you place such an estimate as that?

A. That is purely a speculation on my part. As I say, there is no evidence on the surveys, as Mr. Lipman has brought out, to show that that land is that high above; that is based on my own experience of surveying marsh lands and shore lines, and I should say that there must have been something definitely above the mean high water at that place.

Q. When you speak of a speculation on your part do you mean a speculation of a Coast & Geodetic engineer made under specifications of the Coast & Geodetic Survey and with knowledge of their practice and methods? A. That is quite right.

Recross Examination

Mr. Lipman: Q. If you were told that the Sloat Board actually had surveyors out there around the

(Testimony of Paul A. Smith.)

marsh and found an [184] elevation at .67 of a foot, would that have any persuasive effect on your opinion of what might have been the height of that marsh in the neck?

A. I would consider it, but I would like to weigh all of the sources that they had, and the data; it would have no effect on my estimate of our own topographic surveyors, the work of whom I am quite familiar with in my own experience, and I have used those methods.

Mr. Lipman: That is all.

Mr. Olney: I would like to ask one question.

Q. You say the fact that a shore line is indicated there would indicate to your mind that there was an elevation of at least one foot on the land side of the shore line?

A. Indicated on the old surveys.

Q. On the old surveys. Now, why would it indicate a foot? Suppose it was only six inches?

A. I think I qualified that statement, as I said you cannot say that there is a definite quantitative amount in there, it cannot be said from the evidence.

Q. I realize that, but you express yourself as having an opinion there must be an elevation there of at least a foot.

A. That is based on what I should say the topographer would take as one delineation of the shore line, and if there had been less than a foot, there would have been physiographic changes—if the water flowed across that every mean higher high

(Testimony of Paul A. Smith.)

water, which would be comparatively frequent as compared to only storm water, there would have been physical evidence there that he would have used; so that it must have been approximately a foot. I don't know whether it was half a foot in his opinion, that is 80 years ago, but I should say it should have been of that order.

Q. In other words, at that time he would be simply going there and observing somewhat nearer where he thought the line of mean high tide would be?

A. Yes, but he would be using his exper- [185] ience and training in those particular methods in locating the shore line for nautical purposes.

Q. But his determination of the shore line would not be based upon actual surveys or upon actual tidal observations?

A. Based on actual tidal observations to the extent that at the time, in 1856, the surveys were made, they were making hydrographic surveys from which the topographer could compare his estimate of the shore line with the tidal observations.

Q. That is just what I am getting at. Take the one of 1856, where they had tidal observations; then they would fix their shore line relative to those tidal observations, would they not?

A. The topographical survey?

Q. Yes. A. Yes.

Q. And if the land was just three inches higher it would not affect the shore line on the map?

(Testimony of Paul A. Smith.)

A. Now, let us get that straight. As a topographer goes along the beach he is not running precise levels. He is taking the evidence that he finds on the shore, which in his experience and his knowledge shows him that is the shore line of the mean high water line. He is not making a precise determination of that. When I say "precise" I mean running levels for that purpose. So far as I know, that has never been done.

Q. In locating his shore line, and doing it with reference to tidal observations, he must have a certain elevation in height to establish his line of mean high tide, must he not?

A. Not for the purpose of these topographic surveys which we are looking at here.

Q. Then the shore line in these topographic surveys is simply determined by observation?

A. Why, certainly by observation of the topographer, if that is what you mean.

Q. By what he sees on the beach.

A. By evidences on the beach, [186] as I explained yesterday or the day before yesterday.

Mr. Olney: That is all.

Further Redirect Examination

Miss Phillips: Q. And using his plane table and all the instruments to which you previously referred? A. That is right.

Q. And utilizing also, as you explained, the data of the hydrographer which is also running along similarly? A. That is right.

Miss Phillips: At this time, your Honor, I would like to offer in evidence a certified copy of a map, certified by Professor Priestley, Librarian of the Bancroft Library at the University of California, which map is entitled "Central California in 1848," on file in the Bancroft Library. May I state what this map purports to show: It is of the same nature as counsel brought out from his witnesses yesterday, it is evidence of reputation. This shows the Mexican land grants. It shows upon it the Castro Grant, particularly Mare Island, particularly the upper part, beyond the peninsula or neck of land. This is found on page 5 of "The Works of H. H. Bancroft," Volume 23, now on file in the Bancroft Library.

Yes. en :Z. wlshdrluetaoinetaintao

(The map was marked "U. S. Exhibit W.")

(Set forth in Vol. IV, page 31 of this printed Transcript of Record.)

Also I offer in evidence a copy certified by Professor Priestley of a report of Spanish and Mexican Land Grants in California, prepared by the State Surveyor General of California. I am offering in evidence the reference to the Mare Island Grant, particularly the reference as to the acreage in the grant. I ask that it be marked our next exhibit.

(The document was marked "U. S. Exhibit X.") (Set forth in Vol. III, page 180 of this printed Transcript of Record.)

Now, your Honor, I have another map, but I find that it is missing, I imagine I left it upstairs. It is that portion of the Ringgold map which I said I would secure from the University. [187] I will have that and will be ready to present it at two o'clock. Other than that we close our case.

The Court: We will continue the trial until two p. m.

(A recess was here taken until two o'clock p. m.) [187½]

Afternoon Session.

Miss Phillips: Just prior to the noon recess, your Honor, I expressed my desire to place in evidence of a photographic copy of the Ringgold map which I had in court the day before yesterday from the University of California, but was under promise to return it. I will now offer it in evidence. I believe that a number was reserved for that, I believe it was our exhibit K-8. I will ask that the map be so marked.

The Court: What is the date of that map?

Miss Phillips: This is a map of 1850. It is one of the three maps prepared by Commander Ringgold in 1850. The two places on which Mare Island appear, a part of Mare Island, is at the top, just the promontory part, and a larger section in the lower left hand corner.

The Court: Is there anything in particular about it you wish to call my attention to?

Miss Phillips: Yes, your Honor. This is a map showing various anchorages in San Francisco Bay, Sacramento, etc. In the anchorage of Mare Island, which it shows in the lower left hand corner, he shows as a part of the anchorage a very considerable part as the part we have been describing as the neck of the land.

The Court: Do you mean he shows the anchorages or he shows the neck of the land?

Miss Phillips: He shows the neck of the land in the portion of the chart marked in the lower left-hand corner. The point on which the steam engineering building was built is the sharp projecting point. The point inward is the part we have referred to as the neck of land, as I read the map.

(The map was marked "U. S. Exhibit K-8.")

(Omitted, by designation, from this printed Transcript of Record.)

The Court: The Government rests now?

Miss Phillips: Yes, your Honor. [188]

Mr. Lipman: Just before the recess, your Honor, Captain Carlson was being asked with regard to Exhibit T, and particularly with regard to the profile of Station 6 plus 20. I wonder if Captain Carlson would explain that profile now. The particular point we were mentioning was that it would seem that on that profile the line of 1906

outside the levees was lower than the earlier line. I wish Captain Carlson would explain that.

The Court: Captain Carlson may resume the stand.

CARL A. CARLSON,

recalled for further cross-examination.

Mr. Lipman: Q. Will you explain that matter to us now, Captain Carlson?

A. In looking at the 1906 Rousseau map, I find that the levee is shown projected to the northeast and then it just died out, broken off, just as a draftsman would do with elevations. It is very apparent that what he did when he came there to take the cross section was that he did not hit that levee, and he just mechanically plotted that. The notes will be here in about half an hour and I would like to check that again.

The Court: Q. I didn't just understand you, Captain. Did you say he didn't hit that levee or level? Just what did you say? What exhibit is it that you are referring to there now?

Miss Phillips: That is the Rousseau map of 1906, your Honor, which is U. S. Exhibit S-1.

The Court: Q. And you also have before you U. S. Exhibit T, have you?

A. I have have, yes. Station 6 plus 20—

Q. You say station 6 plus 20, what is that?

A. That is measured from a certain point going south. It is possible in drawing that line it may

(Testimony of Carl A. Carlson.)

cut through here and miss that levee. That levee goes all the way through. We don't question that. As I [189] say, I will have the field notes here in a little while and I would like to check that again.

The Court: Is there any dispute about that, Mr. Lipman?

Mr. Lipman: All I want to say about it, your Honor, is this: If this station 6 plus 20 is taken to indicate a shrinkage outside the levee, I want it understood that that is not correct.

The Court: Here is a lady coming in with some maps now, Captain. Perhaps that is what you want.

The Witness: Manifestly the line could not run through an existing levee; the levee does exist.

Mr. Lipman: Q. So the line of 1906 should not have continued outside that levee?

A. It should start on the inside face.

Q. And it should not have gone through to the water?

A. No. It is just a draftsman's error.

Miss Phillips: I think that what the captain means is this, that the marsh land there which appears to have shrunk outside the levee was, in fact, within the levee. Isn't that it?

Mr. Lipman: That there was no shrinkage outside the levee.

The Witness: You cannot have two elevations at the same time. That would indicate that the levee was built after 1906 and that is not the case, the levee was there.

(Testimony of Carl A. Carlson.)

Mr. Lipman: That clears that up.

Miss Phillips: The witness says that he has the field notes coming, your Honor, and I think the captain can compute this.

The Court: The captain has gone to the rear of the courtroom now to confer with the party. Have you finished with Captain Carlson?

Mr. Lipman: No, your Honor.

The Court: Captain Carlson, resume the stand, please. If [190] you have anything you want to bring with you, please do so.

The Witness: I have nothing further.

The Court: Very well. Mr. Lipman wishes to ask you another question.

Mr. Lipman: Q. Captain Carlson, even outside the area indicated by the levee on this map, would not that have been surveyed in 1906, that is, the area from outside the levee to the water? Of course, they could not survey under the levee, I understand that, but I mean outside the levee.

A. You mean that little short piece there?

Q. Yes.

A. I will have to look at the survey that that is taken from.

Q. Please look at that survey.

(After recess:)

Mr. Lipman: Q. Captain Carlson, I understand that on Exhibit T, referring now to station 6 plus 20, the 1906 line should not have been ex-

(Testimony of Carl A. Carlson.)

tended outside of the levee because you had no levels outside of the levee: is that correct?

A. That is correct.

Q. That line should be x-ed off of the exhibit?

A. How do you want it marked?

Q. Just write it out with a red line.

A. I will put a zigzag red line on it.

Mr. Lipman: That is all, Captain Carlson.

If your Honor please, in my opening statement I said that it was one of the positions of the defendants that under the Mexican Law the shore goes to the highest high water mark any time of the year. Under the decision of the Supreme Court your Honor is entitled to take judicial notice of the Mexican law. However, we find it is difficult to get in hand an authentic translation and copy of the Mexican law, and so, as was done in the Fremont Case I wish to put on a bit of evidence as to the Mexican law. [191]

MAX RADIN

Called for the Defendants, Sworn.

Lipman. Q. What is your occupation, Professor?

A. Professor of Law at the University of California.

Q. What are your special subjects?

A. Civil and comparative law and legal history.

Q. Will you state to the court the scope and extent of your study and work upon those subjects.

(Testimony of Max Radin.)

A. I have written frequently on history of comparative law, have been Chairman of the Section of Comparative Law of the Association of American Law Schools, at the present time of the Section of Comparative Law of the American Bar Association, and a member of the International Conference of Comparative Law.

Q. Will you state whether you are familiar with the Mexican law as it existed during the Mexican occupation of California? A. Yes, I am.

Q. Have you brought with you a book containing the Mexican laws pertaining to what is the seashore and the extent of water boundaries, which laws were in effect during the Mexican regime in California? A. Yes, I have the book here.

Q. Will you please state what that book is?

A. That book is called Mexican Pandex—in Spanish Pandectas Hispano Megicanos. It is volume 3, Edition of 1852.

Q. Will you please state to what extent that work is considered an authentic compilation of Mexican laws?

A. It was an official publication of all of the laws in force in Mexico up to 1852, of course including all of those before that insofar as they may not have been specifically repealed by ordinance or statute.

Q. In what language is it written?

A. In Spanish.

(Testimony of Max Radin.)

Q. Will you please state which law it is that defines what is the seashore, and the law with respect thereto?

A. This law is found [192] in Volume 3 of this book on page 317 numbered 4414. It is a section that is literally from the famous Spanish Code of 1250 of Senor Alphonso Castile, which remained in force in Spain and Mexico until the adoption of the Civil Code, about the year 1860.

Q. I shall ask you to read that law, and for the purpose of the record I will hand the reporter a copy of the law I have actually had typed from the book, so that it can be copied in the record, because I do not want that book left here.

Miss Phillips: I have no objection to your handing it to him. It does not need to be read into the record. You may make it an exhibit. I will accept your statement that you have made a comparison.

Mr. Lipman: I have.

Miss Phillips: In other words, it will not be necessary to read the law in Spanish.

(The matter referred to reads as follows:)

"PARTIDA 3, TIT. XXVIII.

LEY IV.

"Que cosas son aquellas que ome puede fazer en la ribera de la Mar.

"En la ribera de la Mar todo ome puede fazer casa, o cabana, a que se acoja cada que

(Testimony of Max Radin.)

quisiere: e puede fazer otro edificio qualquier de que se aprouenche, de manera que por el non se embargue el vso comunal de la gente: e puede labrar en la ribera Galeas, e otros Nauios qualesquier; e enxugar y redes, e fazerlas de nueuo si quisiere: e en quanto y labrare, o estuuiere, non lo deue otro ninguno embargar, que non pueda vsar, e aprouecharse de todas estas cosas, o de otras semejantes dellas, en la manera que sobredicho es: e todo aquel lugar es llamado ribera de la Mar, quanto se cubre del agua della, quanto mas crece en todo el ano, quier en tiempo del Inuierno, o del Verano. [193]

"Nota: Vattel, Derecho de gentes, lib. 1°, cap. 23."

Mr. Lipman: I will ask you, Professor Radin, if you have made a translation of the law that you have just referred to?

A. I have here a typewritten copy.

Miss Phillips: Might that be copied into the record in the *amé* way, or does your Honor wish to hear that?

Mr. Lipman: Q. Will you state whether or not that is accurate and exact? A. Yes.

The Court: You are offering both of these, are you, the Spanish and the translation into English?

Mr. Lipman: Yes, I am offering the Spanish section and I am giving that to the reporter.

(Testimony of Max Radin.)

The Court: And do you offer the translation?

Mr. Lipman: Yes.

A. I will be very glad to give it to the reporter.

Mr. Lipman: I would like to have the Professor read it.

A. The Section that I understand I am to express an opinion on is the last sentence, but if you wish I can read the entire section.

The Court: Read it all.

A. It comes from the Third Division, Title 28, Law IV of the old Spanish Code:

> "On the sea-shore any man may build a house or cabin which he may use as he pleases; and may construct there any other building for his use provided the public use is not obstructed; and may construct on the shore galleons and other ships of any kind, and may dry nets and remake them there, if he so wishes; and whilst he is working there or remains there, no one shall prevent his using and receiving the benefit of all these things or other similar ones in the manner set forth above; and all that place is called the sea-shore which is covered by the water of the sea to the greatest extent to which it reaches at any time [194] within the whole year, whether in time of winter or of summer."

Mr. Lipman: Q. I will ask you if that is an accurate and exact translation of the Spanish law appearing in the book you have referred to?

(Testimony of Max Radin.)

A. Yes. In one place I said "of the sea," although the Spanish says "of it." "It" would be ambiguous in English.

Q. I will ask you if that law was in effect in California in 1840 and 1841?

A. While California was part of Mexico.

Q. It continued to be in effect until the cession of California to the United States?

A. Until the Treaty of Guadalupe Hidalgo.

Q. I suppose it was also the law prior to 1840?

A. It was a law of Mexico from the time that Mexico was taken by the Spanish until the abrogation of the law, as far as the adoption of the Code.

Q. Professor, will you state whether or not there is any compilation in English of the Mexican laws which were in effect during the Mexican occupation of California that is recognized as accurate and authentic?

A. I have a book here called Mexican Laws, it is The Laws of Mexico by Frederick Hall, it is the Edition of 1885.

Q. Will you identify which paragraph or section of that work is the one that bears on the subject which you have been testifying to?

A. It is Section 1466 on page 448 of this book, which is substantially, though a few words differ, the same translation that I gave. It is a translation of the Spanish text.

(Testimony of Max Radin.)

Q. Will you please read the translation as there given?

A. Do you mean the whole thing, or just the last sentence?

Q. Read the whole thing.

A. "Every man who chooses may build a house or cabin upon the sea-shore as a retreat and he may erect there any other edifice whatever to serve his purposes provided he does not thereby interfere with the use of the shore which [195] everyone has a right in common to enjoy. He may also build galleons there, or any other vessel whatever, or stretch or mend his nets, and when he is there or employed for this or any other purposes of a similar nature no one has a right to disturb him. By the sea-shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, either in winter or summer."

Q. Will ask you if there is any compilation in English or translation in English of the Mexican law that is in more or less general use which is notoriously inaccurate and unreliable?

A. I should say that the translation of the Spanish Code, which is the basis of this Mexican law, which contains this particular passage, which was made by Mr. Scott, and is published under the Spanish title "Las siete partidas," is quite inaccurate, and enjoys no authority whatever among students of Spanish or American legal history.

(Testimony of Max Radin.)

Q. Will you kindly state to what line under the Mexican law which was in effect in 1840 and 1841 in California a grant of land made by the Mexican authorities would go where the grant is to the sea, or a bay, or strait, or other body of water as a boundary?

A. It would go the highest high tide of the year.

Q. In case the Mexican authorities made a grant of an island, will you state to what line under the Mexican law that grant would go?

A. To the same line, in my opinion.

Q. And that was the law in 1840 and 1841, and during the entire Spanish-Mexican regime in California? A. It was.

Q. And that would apply to grants made to private individuals under Mexican colonization laws?

A. There would be no difference applied to any branch.

Mr. Lipman: Take the witness.

Miss Phillips: No questions. [196]

F. E. KNIGHT,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Where do you live Mr. Knight?

A. Just north of Vallejo, in the City of Vallejo, Solano County.

(Testimony of F. E. Knight.)

Q. How long have you lived in the vicinity of Vallejo? A. Since 1905.

Mr. Lipman: At this time I would like to offer in evidence, so that I may question the witness in regard to it, a copy of the Mare Island Quadrangle Map by the United States Geological Survey. I ask that it be marked Defendants' Exhibit 2.

Miss Phillips: Of what date is that map? I think it is very handy as to all maps that we should have the date of the map in the record.

Mr. Lipman: This says the edition of 1916, reprinted 1927.

(The map was marked "Defendants' Exhibit 2.") (Set forth in Vol. IV, page 35 of this printed Transcript of Record.)

Q. I will show you now Defendants' Exhibit No. 2, and ask you if you know the land marked on that map as Island No. 1. A. I do.

Q. How long have you known it?

A. Since 1905.

Q. What was it known as when you first knew that land? A. Island No. 1, or Cross Island.

Q. When you first knew it was the island leveed in? A. It was, yes.

Q. What was the land used for?

A. Farming; it was under cultivation.

The Court: Q. What kind of farming.

A. They raised principally oats.

Q. Do you mean a volunteer crop of oats?

(Testimony of F. E. Knight.)

A. No, they planted it every year. Right up until 1912 it was farmed continuously—I should have said 1916.

Q. Was that for hay?

A. Mostly for hay, but they threshed quite a lot of it, too.

Mr. Lipman: Q. Did the levees in those days go down below [197] or to the southeast of the present Navy Yard fence?

A. I would say southwest—wouldn't it be southwest?

Q. Let me look at the map. The Navy Yard fence is here. I will reframe the question. Do you know the present Navy Yard fence that is a little distance below the Sears Point Toll Road?

A. I do, yes.

My question meant to refer to that fence. Now I will ask you, when you first knew Cross Island did the levees go below or to the southeast of the present Navy Yard fence? A. Yes.

Q. Since you have known Cross Island, has the Government occupied any portion of it?

Miss Phillips: That is objected to as immaterial, irrelevant, and incompetent, not binding on the United States, and cannot affect the title of the United States.

The Court: I think it would be proper to show who was there on the land and what was done with the land. Strictly speaking, of course, it may be that that question calls for a conclusion.

(Testimony of F. E. Knight.)

Mr. Lipman: Q. Have you ever seen any occupation of Cross Island above the Navy Yard fence since the time you have been there?

Miss Phillips: Just a moment until I make my objection. That is objected to as immaterial, irrelevant, and incompetent, it cannot affect the title of the United States.

The Court: Q. How familiar are you with that land in question?

A. I am very familiar with it. I farmed it.

Q. Did you farm it?

A. I farmed it one year at least.

Q. What year was that?

A. I cannot recall just the time, but about ten years ago.

Q. Is that the land beyond what is called the Navy Yard fence?

A. Yes, north of that.

Q. How many acres did you farm there?

A. I plowed and cultivat- [198] ed about 1000 acres, but I only farmed about 200 or 300.

Q. You plowed about 1000? A. Yes.

Q. And you farmed 200 or 300? A. Yes.

Q. Was that all of the land that was in that section?

A. Just in that lower section of that land. It was not all the island.

Q. What was that known as?

A. That was known as Cross Island.

Q. Was that a part of Cross Island?

(Testimony of F. E. Knight.)

A. It was, yes.

Q. It was not all of Cross Island, was it?

A. Cross Island is supposed to contain 7500 acres.

Q. Was the rest of the island farmed?

A. It was up until about 1912 or 1913.

Q. And you went there in what year?

A. 1905.

Q. Who were there besides yourself in 1905.

A. There were several parties.

Q. You testified that you farmed certain land and that you plowed certain land and that you sowed certain land. Who was that owned by?

A. It was owned by Mrs. Ricks at that time.

Q. Did you lease from her?

A. No, I plowed the land for her.

Q. Who was on the land besides yourself—Mrs. Ricks and who else?

A. No one was living there.

Q. Did you live there? A. No, I didn't.

Q. Where did you live?

A. I lived right across the bay, at my present home north of Vallejo.

Q. There was a farm house there?

A. There was, yes.

Q. Who lived there; did anybody live there?

A. There was not anyone at that time.

The Court: Go ahead, Mr. Lipman.

Miss Phillips: Your Honor, may I have a ruling on my objection?

(Testimony of F. E. Knight.)

The Court: Objection overruled. [199]

Miss Phillips: Exception.

Mr. Lipman: Q. The testimony you have given about your farming it was about ten years ago, and it was not in 1905, was it? A. Oh, no.

Q. Who was farming it in 1906?

Miss Phillips: Objected to as immaterial, irrelevant, and incompetent, it cannot affect the title of the United States.

The Court: Objection overruled.

Miss Phillips: Exception.

A. I think Cross farmed the land at that time.

The Court: Q. Did you know Dr. Cross, personally?

A. Very well, yes.

Q. Did he live on the land?

A. His boy did—his son did.

Q. You knew his son, did you? A. Yes.

Q. What was his name?

A. George Cross and Walter Cross—two of his sons.

Q. Did they live there on the land?

A. At that time George Cross lived there.

Q. You used to go over there, did you, once in a while?

A. Quite often, yes.

Q. How did that happen?

A. Well, I was buying land above there, north of there, and I went over to look the land over.

(Testimony of F. E. Knight.)

Mr. Lipman: Q. Is this land in view of your present home, is it in sight of your present home?

A. Yes, it is, it is across the bay.

Q. And you can look across the bay and see Cross Island. A. Yes.

The Court: Q. Where do you live?

A. Just north of Vallejo, about a mile and a quarter.

Q. You say across the bay: what bay?

A. Napa Straits or Napa Bay.

Q. And it is about a mile and a quarter from Vallejo that your home is?

A. From the center of Vallejo, yes. [200]

Q. And you can see the land from your house?

A. Yes.

Mr. Lipman: Q. When you say you look across the bay, you are speaking of the body of water that is marked "Napa River" on Defendants' Exhibit 2?

A. Yes.

Q. Will you point out to the Court approximately where your house is? Just make a dot showing the approximate location of your house.

A. This is my property in here.

Mr. Lipman: The witness indicates his property as in the area where the word "Vallejo" of "Vallejo Hills" appears on Defendants' Exhibit 2. Also the witness marks a point as his house which I shall mark "A" and put a circle around the "A" and the house.

(Testimony of F. E. Knight.)

The Court: Q. Where is the land you say you look across and see? A. This land here.

Miss Phillips: I can hardly hear the witness, your Honor.

The Court: He is pointing to Island No. 1 and to New Land.

Q. What is that—is that marsh land?

A. Marsh land. It has been recently leveed in.

Mr. Lipman: The witness is pointing to the area between *between* Dutchman's Slough and South Slough on Defendants' Exhibit 2.

Q. Will you kindly state what the upper or northwesterly portion of Island No. 1 has been used for in recent years?

Miss Phillips: Objected to as immaterial, irrelevant, and incompetent.

The Court: Objection overruled.

Miss Phillips: Your Honor, may I have a general objection to this line of testimony and an exception?

The Court: Yes.

Miss Phillips: May the objection be considered overruled [201] and that I have an exception? I don't like to be continually objecting.

The Court: Yes, let that be the understanding.

Q. You are speaking now from your own knowledge, are you not? A. Yes.

Mr. Lipman: Q. I would like to ask you what to your knowledge the northwest portion of Island No. 1 has been used for in recent years?

(Testimony of F. E. Knight.)

A. Mostly for gun clubs. There are three gun clubs there; that is, in the last ten years, ten or twelve years anyway.

Q. I would like to ask you if, so far as you know, the Government has occupied or used any portion of Island No. 1 to the northwest of the present Navy Yard fence since you have known the island?

A. I am positive they have not.

The Court: Your answer is not clear. Read the question, Mr. Reporter.

(Question read by the reporter.)

A. (Continuing) Since I have known the island?

Mr. Lipman: Q. Yes, since you have known the island.

A. In 1905 they used the portion below the fence.

Q. I am talking about the portion northwest of the Navy Yard fence. A. No.

The Court: Q. No what?

A. No, they have never used it.

Mr. Lipman: Q. Will you state whether or not there are any power lines which cross any portion of Island No. 1?

Miss Phillips: It is understood my objection goes to this line of questioning and I have an exception?

Mr. Lipman: Certainly.

The Court: Yes, it is so understood.

A. There is across the northern section of the gun club.

(Testimony of F. E. Knight.)

Q. There is a power line, you say?

A. Yes, sir. [202]

Mr. Lipman: Q. Is that a number of towers with lines stretched on them?

A. It is the P. G. & E. line.

Q. Will you state whether you know the Sears Point Toll Road? A. I do, yes.

Q. Does the Sears Point Toll Road run along Island No. 1, speaking of that portion that is northwesterly of the present Navy Yard fence?

A. It does, yes.

Q. When you first knew the Island, was Island No. 1 leveed entirely, all the way?

A. It was, yes.

Mr. Knight, have you had any experience, yourself, in leveeing lands in the vicinity of Vallejo and thereabouts?

A. Quite a bit, yes. I leveed in about 6000 acres.

Q. Can you state approximately what it would cost to levee in Island No. 1, excluding the lands which are to the southeast of the Navy Yard fence?

Miss Phillips: It is understood that my objection still runs to this line of questioning?

The Court: If you wish it, yes.

Miss Phillips: I would like to be considered as objecting and reserving an exception. I don't like to keep interrupting.

The Court: That is all right.

(Testimony of F. E. Knight.)

A. We used to figure it cost about $30 an acre to put in the kind of a levee—of course, we used to have different machines working, and they charged $150 a day for a 100-foot boom at that time.

Mr. Lipman: Q. That is the cost of a levee such as the levee that existed on Island No. 1 when you first knew it? A. Yes.

Q. Can you give me an estimate of what a levee such as the levee on Island No. 1 cost per running foot or running yard?

A. We used to figure then about $30 an acre to put a good levee around one of these islands. That is what it cost me to put a levee around Island No. 3. [203]

Q. That is at the time when you first came there, or thereabouts? A. Yes.

Q. You did not compute it according to the running foot?

A. With small ditches, with a small ditching machine we charged 20 cents a foot, for a small ditching machine, they called it.

Q. Would that small ditching machine make a levee?

A. This had a 100 foot boom to do this work here.

Mr. Lipman: That is all.

Miss Phillips: No questions.

HAROLD CASEBOLT,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Where do you live?

A. Five miles north of Vallejo on Cross Island.

Q. I will show you Defendants' Exhibit No. 2 and ask you if you will kindly indicate, as closely as you can with a pencil the location of the house you live in? A. There.

Mr. Lipman: The witness has marked a point on Island No. 1 which I shall mark "B" with a circle around it.

Q. How long have you lived on Cross Island?

A. A little over seven years. I came there in March, 1930.

Q. Where did you live prior to that?

A. Pasadena.

Q. What is your occupation? A. Farmer.

Q. What do you do in that connection on Island No. 1?

Miss Phillips: Objected to as immaterial, irrelevant, and incompetent.

The Court: Overruled.

Miss Phillips: Exception. May it be understood I have an objection to this line of testimony and an exception?

The Court: Yes.

A. I raised grain and a few cattle. [204]

Mr. Lipman: Q. How much of Island No. 1 do you farm?

A. I think about 2040 acres; there are about 300 acres of summer fallow.

(Testimony of Harold Casebolt.)

Q. For whom do you farm the land?

A. Mr. Irvine.

Q. Will you please state what the land on the northerly portion, the northwesterly portion of Cross Island, has been used for since you have known it? A. Gun club or duck club.

Q. How much of the island is occupied by them?

A. I don't know what the acreage is up there.

Q. Can you give us it in fractions, that is to say, a half, or a third, or a quarter?

A. I would say in the neighborhood of one-third, probably.

Q. Do you know whether there are any power lines crossing Cross Island? A. There are.

Miss Phillips: It is understood my objection still runs to this line of testimony, and an exception?

The Court: Yes.

Mr. Lipman: Q. Does Sears Point Toll Road run along across the Island from the present Navy Yard fence to the northwesterly end of the Island?

A. Yes.

Q. Since you have been living on Cross Island has the Government, to your knowledge, used or occupied any part of Cross Island to the northwestward of the present Navy Yard fence?

Miss Phillips: The same objection that I made is still running? This is a different branch of testimony and I want it understood the same objection is made.

(Testimony of Harold Casebolt.)

The Court: Yes; overruled and an exception.

A. No, it has not.

Mr. Lipman: Q. Since you have lived on Cross Island have you been a registered voter?

A. Yes.

Q. In what county are you registered?

A. Solano. [205]

Q. Where do you vote? A. Bay Terrace.

The Court: Where is that, in Vallejo?

A. It is just across the river, it is not in the limits of Vallejo, it is just across the Napa River.

Mr. Lipman: Q. Do you receive through the mail election notices and all that? A. Yes.

The Court: Q. Where is your post office?

A. Vallejo.

Mr. Lipman: Q. Since you have known Cross Island has all of it been used and occupied to the northwest of the present Navy Yard fence?

A. Yes, for some purpose or other.

Q. By that you mean what?

A. Some portion grain farms, some for pasturage, and some for duck clubs.

Mr. Lipman: No further questions.

Miss Phillips: No questions.

F. W. RUSH,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Where do you live?

A. Near Fairfield, Solano County.

Q. What is your present occupation?

A. Superintendent of the Solano County Mosquito Abatement District.

Q. When was that district organized?

A. In 1930.

Q. Have you been with the district since then?

A. Yes.

Q. Will you state what the boundaries of the district are?

Miss Phillips: I object to the question as immaterial, irrelevant, and incompetent.

The Court: Overruled.

Miss Phillips: Exception.

A. They are identical with those of Solano County.

Mr. Lipman: Q. Are you familiar with the land known as Cross Island, shown on Defendants' Exhibit No. 2 as Island No. 1? [206]

A. I am familiar with Cross Island, yes.

Q. Will you state whether or not the Mosquito Abatement District has done any work on that portion of Cross Island which lies to the northwest of the present Navy Yard fence?

Miss Phillips: Is it understood that my objection goes to this whole line of testimony, your Honor?

(Testimony of F. W. Rush.)

The Court: Yes, if you wish it.

Miss Phillips: I do wish it.

A. We have done considerable work——

The Court: What is the point?

Mr. Lipman: The point is, in our third defense we have alleged that the area of Cross Island to the northwest of the Navy Yard fence has been used and treated as any other land in California, and that different districts have been formed and operated in that area quite in contrast with what happened below.

Q. Will you state in general what the nature of the work has been that has been done by the District on Cross Island?

A. It has consisted of drainage work, installation of drain boxes, or tide gates, and operations to destroy mosquito larvae.

Q. Has the Mosquito Abatement District done any work to the southeast of the present Navy Yard fence? A. No.

Q. It has never done any such work?

A. No, not of that character.

Mr. Lipman: No further questions.

Miss Phillips: No cross-examination.

The Court: That has all been done under the State of California—the Mosquito Abatement District is an organization under the laws of the State of California?

A. It is a State proposition.

(Testimony of F. W. Rush.)

Q. Like a water district, or municipal district?

A. Similar to an irrigation district.

Q. Organized under the laws of the State of California? A. Yes.

Q. Your salary is paid by the State?

A. Paid by the district. [207]

Mr. Lipman: I want to ask perhaps one or two more questions.

Q. Have any of the officers or agents of the district taken up with the Navy Yard people mosquito abatement work to the southeast of the present Navy Yard fence?

A. I do not understand the question, have they taken it up.

Q. Have you discussed it with them?

A. Yes, we have.

Q. You say that no work has been done by the Mosquito Abatement District south of the fence?

A. I said no work of the same character. The only work that we have done——

Q. Yes.

A. (Continuing) Inside of the boundaries of the Navy Yard, as I understand them, has been simply to advise them in an advisory capacity; every once in a while we go there and they ask the best method, and we may send an inspector in and tell them they have some larvae, and what they should do, but they do not allow us to go inside of the enclosure.

(Testimony of F. W. Rush.)

Q. After such recommendations, to your knowledge, has any of the work recommended been done?

A. Inside of the Navy Yard enclosure?

Q. Inside of the Navy Yard enclosure.

A. Yes.

Q. By whom?

A. By the Navy Yard people.

Mr. Lipman: That is all.

Miss. Phillips: No cross-examination.

Mr. Lipman: There are two or three questions I meant to ask Mr. Casebolt which I did not, and I would like to recall him.

HAROLD CASEBOLT,

Recalled for Defendants.

Mr. Lipman: Q. Mr. Casebolt, I show you now Defendants' Exhibit No. 2, and I am referring to the area between Dutchman's Slough and South Slough, and I will ask you what the condition of that land was when you first knew it?

A. Well, it was tide land, [208] as they call it, it came in and out, the same as anywhere else.

Q. Was it leveed?

A. No, it was not when I went there.

Q. At that time was it capable of being used to produce crops? A. No.

Q. Or pasture cattle? A. No.

Q. Or for any agricultural purposes?

A. No.

Q. Has it since been leveed in? A. Yes.

Q. About when was it leveed in?

Miss Phillips: I have the same objection to this line I made before—I ask that my objection still run to this line of testimony.

The Court: Very well.

Miss Phillips: Thank you, your Honor, and an exception.

A. I don't know; it was in 1932 or 1933 that that was leveed in.

Mr. Lipman: Q. Is it entirely leveed to-day?

A. Yes.

Q. Has it been drained yet?

A. You mean by drained, what?

Q. What I am trying to get at has it been plowed and put to use that way?

A. Yes, we raised three crops on it.

Q. Will you state whether or not Dutchman's Slough is navigable? A. To how big boats?

Q. Well, any sized boats?

A. Rowboats, yes.

Miss Phillips: Just a minute, what is the pertinency?

Mr. Lipman: I am trying to prove Dutchman's Slough to-day runs right through up to South Slough. Let me ask it that way.

Q. Dutchman's Slough runs to-day from Mare Island Straits in Napa River right through, continuously up to South Slough? A. Yes.

Mr. Lipman: That is all.

(Testimony of Harold Casebolt.)

Cross Examination

Miss Phillips: Q. There has been quite a little bit of alteration in that territory, has there not, in the neighbor- [209] hood of Dutchman's Slough, there has been leveeing and cross-cutting, etc. through there in the last fifteen or twenty years, or do you know?

A. I do not know except the last seven years that I have been on the island, that was just the levee on the east side of Dutchman's Slough, that is the only part that has been leveed that I know of.

Miss Phillips: I think perhaps the maps show it, anyway.

Q. Has there been any dredging in Dutchman's Slough?

A. No, except to make the levee with.

Mr. Olney: Might we ask whether there is any contention made by the Government that that Dutchman's Slough has not extended all the time from Mare Island Straits clear through to South Slough?

Miss Phillips: There have been alterations in the extent of it.

Mr. Olney: It has always extended as a channel the bed of which was below mean high water mark?

Miss Phillips: I am not quite sure as to that. I think the early maps and the symbols upon them will show better than anything I can say off-hand.

Mr. Olney: You do not contest the early maps in that respect?

Miss Phillips: No, I do not contest the early maps, the Coast & Geodetic Survey maps.

Mr. Lipman: In connection with certain phases of the case, an agreement has been made that certain things will be stipulated to, your Honor, and I will now read the same. As I understand it will be stipulated that each of the defendants claim to own that portion of the lands described in the amended bill or that interest therein set forth in the answer filed on behalf of such defendants, and that whatever title or interest the [210] State of California or any of its successors in interest ever had to said lands under the Swamp Land Act, or by reason of the facts pleaded in the Defendants' Third Defense, is now vested in the defendant claiming the same as set forth in his said answer, and that so far as the defendants or any of them own any of the lands described in the Bill, each defendant owns that portion thereof claimed to be owned by him or it as set forth in his or its answer, it being expressly understood, however, that the United States does not concede but expressly denies that either the State of California or any of its successors in interest ever had or now has any title

or interest in or to any of the lands described in the Bill.

Miss Phillips: So stipulated.

Mr. Lipman: It is stipulated that ever since 1914 all of the lands to the southeast of the fence between Survey 569 and Survey 34 have been in the exclusive possession of the United States as lands belonging to the Mare Island Navy Yard reservation.

Miss Phillips: That is not an issue, is it?

Mr. Lipman: I do not know, but I want to have it stipulated.

Miss Phillips: I do not remember, I have not got that down.

Mr. Lipman: It is also stipulated that all of the lands in controversy in this suit have consistently been assessed and taxed each year since 1882.

Miss Phillips: By whom?

Mr. Lipman: By the State of California, political subdivision.

Miss Phillips: I would like to make the point that I am stipulating as to the fact of taxation to avoid unnecessarily encumbering the record, but my stipulation is subject to the objection which I now make to admitting this evidence, that it is [211] immaterial, irrelevant, and incompetent, not binding on the United States, and cannot in anyway affect the title of the United States.

The Court: If you want a ruling on that, it is overruled, and an exception.

Mr. Lipman: Is it stipulated that since the year 1890 a number of civil cases have been brought and prosecuted in the Courts of the State of California pertaining to the lands in controversy here?

Miss Phillips: I make the same stipulation to avoid encumbering the record, but subject to the objection which I now make to the introduction and admission of this evidence, on the ground that it is immaterial, irrelevant, and incompetent, and not binding on the United States, and cannot in any way affect the title of the United States.

The Court: Overruled, and an exception.

Mr. Lipman: It will perhaps shorten it up, and I will ask Counsel to state again so that I fully understand, the purpose for which the transparent representations of other maps were offered in evidence.

Miss Phillips: Perhaps, your Honor, I assumed that other people have as much difficulty in handling technical and complicated things as I have, but to me much of the value of a technical exhibit is to be able to understand it easily. The purpose of the first group of transparencies handed in was to reduce to the same scale, various maps, which had never been made on this scale, reduce them to the scale of the Coast & Geodetic topographical surveys, and then the transparencies being reduced to the same scale, being a map of the same area, by putting the Coast Survey underneath, in each instance each island as indicated by the mappers

at different times, the boundaries as he understood them, can be [212] compared by the Court by the simple method of putting a transparent map of the same scale over the Coast & Geodetic Survey map. That was the purpose of it.

The Court: It was for the purpose of showing the shore line, was it not?

Miss Phillips: Yes, the island, the shore line as shown by each successive mapper, some of them, I think most of them preceding the first you might say, precisely accurate. The purpose of the transparency used this morning, of course, by Lieutenant Smith, I think was quite obvious, that that permitted an exact visual comparison by anyone of two surveys made thirty years apart, and then a comparison of each of those with the aeroplane map. That is the purpose of it. Perhaps I am accusing other people of being equally as difficult as myself in understanding exhibits many times. Each of these transparencies is in fact in evidence in another form.

Mr. Lipman: I now wish to offer a number of documentary exhibits. My next exhibit in order will be a copy of the Napa Quadrangle by the United States Geological Survey, Edition of May, 1902, reprinted in 1932. I ask that it be marked Defendants' Exhibit 3. One of the reasons we put in that map is I think Lieutenant Smith testified that the name Island No. 1 came off of one of these quad-

rangle maps dated 1902. This map shows the area of Island No. 1 with that name on it.

(The Map was marked "Defendants' Exhibit 3.") (Set forth in Vol. IV, page 36 of this printed Transcript of Record)

There has been a good deal of discussion in this case of Survey No. 569, and so for the purpose of the record I wish to offer in evidence a certified copy of Survey No. 569, as Defendants' Exhibit No. 4.

Miss Phillips: Your Honor, may I make an objection to that? I object to the introduction of this exhibit if it is intended to [213] be used to affect the title of the United States, on the ground it is immaterial, irrelevant, and incompetent, and not affecting in any wise the title of the United States, and for the further reason that the survey was incompetent because the lands at the time were in the ownership of the United States in its proprietary interest.

The Court: Overruled, and an exception.

(The document was marked "Defendants' Exhibit 4.") (Set forth in Vol. IV, page 37 of this printed Transcript of Record)

Mr. Lipman: When the Government offered in evidence the copy of the Sanger Report as Exhibit P I objected to that on the ground that the report showed on its face that there was at that time a controversy as to who owned marsh lands to the

north of Mare Island, and one of the responses to that, as I understood it, was that my statement that the land had been surveyed in 1869 on behalf of a man by the name of Hinckley, who was purchasing it from the State, did not appear, and therefore in effect I understood that my objection was premature. I am now offering in evidence Survey 569, which will show on its face that it was made in 1869. And it also has been stipulated that whatever title the State may have had under the Swamp Land Act passed to us, and with that foundation I now move that the Sanger Report, Exhibit P be stricken.

Miss Phillips: I have not the record here, I do not remember Counsel's and my discussion of the Sanger report. I did not mean to state at the time there was a question of whether or not a claim had been made by Hinckley. I did not mean to dispute that, but the point I made was that so far as the Sanger report is concerned that a plan of fortification of the Navy Yard with improvements of one sort and another was made by a number of officers in their official duty, that they had gathered together details of base information and it was reported on by them at [214] the time, and that I considered that of evidentiary value, and under the various sections of the Code which I cited to your Honor the report was admissible as a public document. I have read since the code section and I see no exception to the rules of the state permitting the admission in evidence of a public

record merely because there was some controversy at the time. I see no exception in the code section of California which makes this a public record, worthy of being allowed in evidence. I pointed out to your Honor that at any time in this report this board of officers expressed any statement on any point of law or on controversial matters, I would say, that the weight of it in that respect would be very trifling, if any at all; in fact, as your Honor indicated, there would be no weight to it. It seemed to me at the time, and I still feel, that counsel's objection to that is largely one of weight of the evidence. This is a public record, it was made in the performance of official duties by a public tribunal exactly prescribed in the section of the California Code of Civil Procedure. The exception that counsel is now seeking to read into the code is not there, it does not exist, but all of this, of course, should be considered by your Honor and not considered by us.

Mr. Lipman: I merely make my objection to the exhibit without re-stating or re-arguing it. I just wanted to be sure that my objection was not insufficient, because the factual basis which I stated at the time did not appear of record and now appears of record, so that if it was premature I want to reserve the objection.

The Court: Overruled, and an exception.

Mr. Lipman: I next want to offer in evidence, your Honor, a number of certified copies of patents

which are referred to in the pleadings. The first patent I wish to offer is the [215] *is the* patent from the State to Pearson, of 1874. I ask that that be marked Defendants' Exhibit next in order.

(The document was marked "Defendants' Exhibit 5.") (Set forth in Vol. III, page 185 of this printed Transcript of Record)

I next wish to offer a patent, or, rather, a certified copy of a patent which is Swamp Land Patent No. 72, issued by the United States to the State of California, in 1896, and ask that it be marked our Exhibit next in order.

(The document was marked "Defendants' Exhibit 6.") (Set forth in Vol. III, page 189 of this printed Transcript of Record)

I next wish to offer in evidence two certified copies of Swamp Land Patents, both numbered 152. They seem to differ somewhat in their descriptions. The patent bears the number 109391. They both have that number. I wish to offer both of them as our exhibit next in order. Counsel tells me, your Honor, that upstairs they have a certified copy from the United States Land Office. My offer is, of course, subject to any correction.

Miss Phillips: Yes. I suggest that both of them be given the same number. I will bring down my two copies and then counsel can withdraw the one which he does not want left in.

The Court: Very well, let that be the understanding.

Mr. Palmer: Is it not possible that those were issued in that form to cover the division line between Napa and Sonoma Counties?

Miss Phillips: That may be. I don't know anything about that.

Mr. Lipman: That is possible, but they are both certified by the same county recorder.

(The documents were marked "Defendants' Exhibit 7.") (Set forth in Vol. III, page 192 of this printed Transcript of Record)

I next offer in evidence certified copy of patent No. 937055 issued by the United States to the State of California, under date of April 6, 1924, and I ask that that be marked our exhibit next in order.

(The document was marked "Defendants' Exhibit 8.") (Set forth in Vol. III, page 196 of this printed Transcript of Record)

[216]

I next offer in evidence, if your Honor please, in connection with our third defense, a certified copy of a map which was recorded by the Government in the Recorder's Office of Solano County on November 10, 1913. This map is a map which was filed pursuant to the statute of California to which we have referred in our third defense, which cedes jurisdiction to the United States of those areas

occupied as military and other reservations, provided that a sufficient description is filed or recorded in the proper counties. This is a certified copy of that map.

Miss Phillips: I wish to make the objection, your honor, that this is immaterial, irrelevant, and incompetent, not binding on the United States, and does not affect its title. Our position on that, your Honor, must necessarily be and is that a title by prescription cannot be obtained against the United States; only Congress can alienate the lands of the United States.

The Court: Objection overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 9.") (Set forth in Vol. IV, page 38 of this printed Transcript of Record.)

Mr. Lipman: I would like particularly to show your Honor this map because it indicates what the Government, itself, filed as indicating the boundary line of Mare Island Navy Yard reservation in 1913. I would like particularly to call your Honor's attention to the fact that the line shown almost on the extreme left hand side of the map is the southerly boundary line of Survey 569.

I next wish to show the Court a map which was published in 1855, showing the area of the State of California. This map does not belong to us, but belongs to the Keeper of Archives in

the State Department at Sacramento. He has very kindly let us have this to show in court. I have had photostated and enlarged the area in the vicinity of Mare Island. I wish to show the map, itself, to [217] the Court and then offer in evidence the photostat, so that I may return the map to its own. I will say to the Court that the particular feature of this map that I wish to call attention to is that the County of Solano on this map is shown in, I believe, a pale blue, whereas the County of Sonoma is shown in yellow. The portion indicating Mare Island which was in Solano County in 1855 is shown as a blue tip on the end of the peninsula that can be identified as Mare Island.

I will show your Honor now the photostatic enlargement which I wish to offer in evidence. I wish to say that the pertinency of this exhibit, which will be Defendants' Exhibit 10, is this: That originally Mare Island was a part of Sonoma County. In 1852, I believe it was, a statute was passed which excluded Mare Island from Sonoma County, and I believe in the next year Mare Island was by statute annexed to Solano County. At that time the boundary of Sonoma County came clear down to the Napa River and the Mare Island Straits. This map will show what the map maker understood was the boundary line between Solano County and Sonoma County at that time.

Miss Phillips: May I have the record show the name of the original map maker?

Mr. Lipman: The map is entitled "Published by J. H. Coulton & Co., 172 William Street, New York. Entered according to Act of Congress in the year 1855 by J. H. Coulton & Co., in the Clerk's Office of the District Court for the Southern District of New York."

(The map was marked "Defendants' Exhibit 10.") (Set forth in Vol. IV, page 39 of this printed Transcript of Record.)

I next wish to offer in evidence a certified copy of a map which is now on file in the Huntington Library, entitled "Map of the Gold Region of California, Taken from a Recent Survey by Robert H. Ellis, 1850." The purpose of this offer, your Honor, is to show, particularly, what this map maker understood [218] to be Mare Island. I will indicate Mare Island on this map.

(The map was marked "Defendants' Exhibit 11.") (Set forth in Vol. IV, page 40 of this printed Transcript of Record.)

Our next exhibit, if the Court please, will be a photostatic copy of the Mare Island region taken from a map of 1886 issued by the General Land Office. The large map which we have here belongs to the San Francisco Library. They have very kindly allowed us to borrow it to display to the Court. I have had photostated the legend on the map and also the Mare Island region, so that we can have that in evidence. The purpose of this offer is

that on this map is shown in a reddish color all the then military and naval reservations of the United States. I wish to show what the General Land Office showed on this map as the Mare Island Navy Yard Reservation. I think your Honor will be able to see this much better when we show our photostat, which enlarges this section of the map. I will offer a certified copy or photostatic copy, rather, of the portion of the map just referred to. I wish to show your Honor the enlargement, which shows the Mare Island Reservation in red.

(The photostat was marked "Defendants' Exhibit 12.") (Set forth in Vol. IV, page 41 of this printed Transcript of Record.)

I had thought, your Honor, that possibly we were going to get through this afternoon, but I find that I have more evidence than we can present this afternoon.

The Court: We will continue the trial of the case until next Tuesday at ten o'clock.

(An adjournment was here taken until Tuesday, June 15, 1937, at ten o'clock a. m.) [219]

Tuesday, June 15, 1937.

Mr. Lipman: If the Court please, at the conclusion of the last session we were putting in evidence a series of maps showing, as we feel, what

Mare Island was by way of reputation. I have just a few more maps of that character to offer. I have here a copy of a map certified by Mr. Priestley from the Bancroft Library. It is entitled "Topographical Sketch of the Gold and Quicksilver District of California, July 25, 1848, E. O. C. O., Lieutenant U. S. A." I would like to show the region of Mare Island on this map to your Honor.

(The map was marked "Defendants' Exhibit 13.") (Set forth in Vol. IV, page 32 of this printed Transcript of Record.)

We next have a series of certified copies of maps of the Mare Island section, official maps of Solano County. The first one is a map of 1890. These maps I believe are all by E. N. Eager, who was the County Surveyor. I first offer a certified copy of the map of 1890.

(The map was marked "Defendants' Exhibit 14.") (Set forth in Vol. IV, page 43 of this printed Transcript of Record.)

The next is a certified copy of a map of 1909. Perhaps I need not show your Honor this one. It looks very similar to the previous one.

(The map was marked "Defendants' Exhibit 15.") (Set forth in Vol. IV, page 45 of this printed Transcript of Record.)

The next is a copy of a 1925 map by Eager, which we ask to have marked our exhibit next in order.

This one describes Mr. Eager as "Ex-County Surveyor," so perhaps he was not the County Surveyor at that time.

(The map was marked "Defendants' Exhibit 16.") (Set forth in Vol. IV, page 47 of this printed Transcript of Record.)

From the O'Donnell Case we have made a photostatic copy of the Coast Survey Chart known as the Hilgard Chart of 1884. I should like to offer that as our next exhibit in order. This shows the entire area here again, very similarly to some of the [220] earlier Coast Guard maps.

(The Chart was marked "Defendants' Exhibit 17.") (Set forth in Vol. IV, page 49 of this printed Transcript of Record.)

I noticed in checking through the amendments to the Answers, both the amendment to the Answer of the Stewart defendants and also the James Irvine Answer, that there was a typographical error. On page 7 of each amendment we referred by reference to allegations in the answer proper to the Irwin suit. We said sub-paragraph (a) of subdivision 2, whereas it should have been subdivision (b). I will ask an order of the Court that the Clerk be instructed to change that on the face of the pleading. In the Stewart answer it occurs on lines 10 and 12 on page 7; in the Irvine answer it occurs on lines 6 and 8 on page 7.

The Court: It is so ordered.

Mr. Lipman: At the last session the Government offered in evidence as U. S. Exhibit W a photostatic copy of a map in Bancroft's History which is entitled "Central California in 1848." I do not believe it was made to appear that that map was not published in 1848, and it does not purport to be a copy of a map published in 1848, but was a map made as a portion of and as an illustration of Bancroft's own works, which were published in 1888.

Miss Phillips: That is correct. I would assume that all of us knew that Bancroft was not much more than an infant, if not an infant, in 1848. That was offered as his map of the grants as he compiled them in his history, which I do not remember the date of, but it was certainly 20 or 30 years after that.

Mr. Lipman: Furthermore, I wish to call the Court's attention in connection with the statement that it shows his idea of the Mexican grants to the fact that it does not purport to show the grants by boundaries, but merely has the name such and such rancho appearing here and there, and, similarly, has the names of in- [221] dividuals appearing here and there, indicating the location in general of their ownership, where it was not based perhaps on a Mexican grant. I wish to call the Court's particular attention to the fact that Mare Island, while shown as a peninsula, is not labeled "Mare Island." The word "Mare Island" does not appear, nor is

the word "Castro Grant" on the island, just the name "Castro," itself.

The Court: What volume of Bancroft's does that appear in?

Mr. Lipman: Volume 23 of Bancroft's Works, which is Volume 6 of the volumes that pertain to the history of California. It appears on page 5 of that volume.

In the Answers of the defendants the adjudication that took place in the case of Bouldin v. Phelps is alleged. We wish to prove that adjudication. I see that the records are here. It was going to be my purpose at first to offer the judgment roll in the Bouldin Case in evidence, but it occurred to me that that perhaps may just clutter up our record. I wonder if it cannot be understood that the judgment roll, while not formally offered in evidence, be deemed in evidence for the purpose of referring to it. Of course, it will be in the Clerk's files, and we can refer to it without encumbering the record with it.

Miss Phillips: I think it is inevitable in the discussion of the legal issues in this case that both sides will refer to the opinion of the Court in Bouldin v. Phelps as an authority on the subject-matter. I think the reference to a case in its enunciation of legal principles and the filing of a judgment in the case on the theory that the issues are res adjudicata are two separate things. As to a reference to Bouldin v. Phelps at one time or another on the legal questions, both of us are certain to

refer to it. I have no objection to that at all. That is a question of an authority on the enunciation of legal prin- [222] ciples. Counsel, in offering the judgment roll in evidence, must be doing it, I think, on one of two theories, either that there was a judgment which makes certain issues of fact or of law res adjudicata against the United States and in his favor, or vice versa. It must be one or the other. In my judgment, the judgment roll cannot be received in evidence for any such purpose. The parties were not the same, the issues were not the same; the title of the United States was not and could not be adjulicated in that case. Therefore, I object to the offer of the judgment roll in evidence on the ground that no foundation has been laid, on the ground that the parties were not the same, and on the further ground that the title of the United States was not adjudicated and could not be adjudicated in that case.

Mr. Lipman: If the Court please, we are not offering the judgment roll on the theory that there is any strict principle of res adjudicata applying. As I understand it, the way you prove what was adjudged in an action is to offer the judgment roll. I am sure that the law is that your Honor can take judicial notice of the published opinion. The published opinion tells what the principles are that the Court was applying. I think the strict proof of what was adjudged lies in the judgment roll, itself. I do not ask Miss Phillips to stipulate that the judgment roll can go into evidence; all that I

am asking is that it is stipulated that we deem it in evidence without actually putting it in, subject to whatever objections Miss Phillips properly could have to the judgment roll, itself, if it were offered in evidence. That would save us a lot of record here, and yet it would give us whatever right we have to look to the judgment roll as though it were actually incorporated in our record.

Miss Phillips: It seems to me, then, that counsel has just [223] about agreed that the judgment roll in that case does not become res adjudicata in this case. If he is offering the judgment roll solely for the purpose of the Court being able to understand the published opinion with greater accuracy that is another matter. In that case he is simply referring to Bouldin v. Phelps as a case citing and discussing questions of law, and the Court in that event might look at the judgment or the record in that case just as in any case for a better understanding of the published opinion.

Mr. Lipman: Of course, we want to show, for instance, that the United States Attorney's Office represented the defendant, and what the issues were, and things of that sort. As I said, we do not claim that on strict principles of res adjudicata the Government is bound. We claim that the fact that the Government was in that case by special counsel appointed for that purpose, and that the United States Attorney's Office represented the defendants, and that they set up and proved that the Castro Grant was a fraud should receive great

consideration by this Court. We do not urge it strictly on the ground that it is res adjudicata. In order to have before us just what was adjudicated, what the issues were, and who appeared, we want the judgment roll. In addition to that I am going to offer in evidence the appointment of Judge Rhodes as special counsel for the Government, and I am also going to offer in evidence his oath of office. I would offer the judgment roll, itself, except that I don't want to clutter up our record with it.

The Court: I can see no objection to the judgment roll being received in evidence in the manner suggested by Mr. Lipman.

Miss Phillips: If it is solely for the purpose of our understanding the opinion that is one matter. I observe, however, that counsel is making a reservation in his statement with the [224] idea, after all, that this is offered to conclude the Government. Of course, that business about appointing a United States Attorney to represent the defendant, good gracious, I have represented defendants, myself, in my capacity as Assistant United States Attorney. The fact that a Government attorney is sometimes appointed to represented a defendant is neither here nor there. Your Honor has sat in cases where United States Attorneys, by virtue of their office, have represented individuals.

Mr. Lipman: I think that goes to what the legal effect is going to be. I think Miss Phillips has

made her objection perfectly clear, and I suggest that your Honor rule on the objection.

The Court: If a question arises as suggested by Miss Phillips, that is to say, the question as to whether or not there is res adjudicata, perhaps I would sustain her objection.

Mr. Olney: If your Honor please, may I say a word here? There is not any question whatever that the judgment in the Bouldin case is not res adjudicata as between the defendants in this case and the United States. We make no contention to that effect. That just would not be the law.

The Court: Then I think it should be received in evidence.

Mr. Olney: I do want to say, so that it is clearly understood, on what theory this is introduced. We desire not merely the record in the Bouldin Case before the Court for the purpose of showing what questions of law were determined there, but as showing that the Government in that case took a directly opposite position to the position that it is taking here. In that connection, and as a part of that line of proof, we are going to introduce further evidence for the purpose of proving what we may call an equitable estoppel against the Government by reason of its actions in this matter, in the history of this. I suggest that this evidence go in now and that its bearing in that respect can be considered [225] by the Court hereafter.

Miss Phillips: Counsel's second statement now illuminates the purpose of the offer. I had in mind

that there was some such purpose and it was not revealed by Mr. Lipman's statement. That is the theory that the proposed exhibit, though not res adjudicata, would operate as an estoppel. I renew the objection I made, and I make the further objection that the parties were not the same, and that the interests were not the same, and that an equitable estoppel cannot operate against the Government and prejudice the Government's title, on well settled principles of law, and that this record should not be received in evidence for that reason.

Mr. Olney: If your Honor please, on the question of equitable estoppel—

The Court: Well, I would wish to consider that question, anyhow, Judge Olney, so I suggest that I reserve my ruling and let the offered evidence be received. I will reserve my ruling upon that point.

Mr. Lipman: I now wish to offer in evidence a certified copy of the appointment of Judge Rhodes as a special assistant attorney of the United States in the Bouldin Case.

Miss Phillips: Objected to on the same grounds, your Honor, as previously urged to the offer of the record in the Bouldin Case. My notion on that would be that this really should be offered as a part of the preceding exhibit, so that the objection would run to Bouldin v. Phelps and the document which counsel is now tendering.

Mr. Lipman: The only thing is, my suggestion in connection with the previous evidence was that

we would deem it in evidence without physically marking it an exhibit and take it out of the Clerk's files in the Bouldin Case and mark it in this file. [226]

The Court: I think that suggestion is a good one.

Mr. Lipman: In this case the appointment of Rhodes and his oath are not a part of the judgment roll, they are separate documents, and it is simple to have those certified. I have certified copies, and we can offer them and thus avoid the difficulty of taking the papers out of the Clerk's office from another file. I have no objection to Miss Phillip's objection running to both of these documents, just the same as the objection to the judgment roll.

The Court: Very well. I am reserving my ruling on all of these offers.

Mr. Lipman: The appointment of Rhodes, I desire to offer as Defendants' Exhibit 18.

(The document was marked "Defendants' Exhibit 18.") (Omitted, by designation, from this printed Transcript of Record.)

The oath of office I offer as Defendants' Exhibit 19.

(The document was marked "Defendants' Exhibit 19.") (Omitted, by designation, from this printed Transcript of Record.)

Now in similar fashion I wish to offer to have deemed in evidence the judgment roll in the Irwin

case. The situation is exactly the same with regard to the judgment roll in that case as in the Bouldin case. As Miss Phillips suggested that I did not state we claimed an estoppel, of course I thought I was indicating that we claimed something other than a strict res adjudicata, when I stated that the fact that the government employed special counsel was a matter to be considered. I intended to indicate that we claimed that it was more than the mere precedent of a previous decision. I make the same offer, that the judgment roll in the Irwin case be deemed in evidence in this case.

(Set forth in Vol. III, page 287 of this printed Transcript of Record.)

Miss Phillips: I make the same objection, that it is immaterial, irrelevant and incompetent, and not binding on the United States, it does not affect the title of the United States, and, furthermore, the issues and the parties are not the same, no [227] foundation has been laid for offering it in evidence.

The Court: I will reserve my ruling.

Mr. Lipman: I next wish to offer in evidence as an exhibit a certified copy of Judge Rhodes' appointment as Special Assistant United States Attorney in the Irwin Case.

Miss Phillips: The same objection.

(The document was marked "Defendants' Exhibit 20.") (Set forth in Vol. III, page 203 of this printed Transcript of Record.)

Mr. Lipman: I wish to offer in evidence a letter from the file in the Irwin Case by the Acting Attorney General Jenks to Judge Rhodes, ordering him to sue out a writ of error in the Irwin Case.

Miss Phillips: The same objection, your Honor.

The Court: Yes, I will reserve my ruling in all of these matters.

Mr. Olney: If I may interrupt, so as to make the offer of the Irwin Case perfectly clear, one of the objects of introducing it is the one I have already stated, and further, the Irwin judgment has a direct bearing upon the defense, especially the defense that we put in in connection with the boundary line, that is a part of the circumstances by which the boundary line of Mare Island was established, in accordance with the defense that we have presented, and outside of anything else the judgment roll in the Irwin Case is admissible in connection with that particular defense, so that so far as the Irwin judgment roll is concerned its admissibility is not determined by the same considerations as would apply to the judgment roll in the Bouldin Case.

Miss Phillips: My position is as previously stated. The third defense of these defendants is, after all, the defense of title by prescription. We have been referring to third equitable defense in rather a indefinite way, as though something new and strange, but it is not. It is just the old defense of title [228] by prescription, and that is a matter to be argued. But the objections which I

have made are all based on the theory that you cannot obtain a title by prescription against the United States, regardless of whether or not at times it might be a hardship or might not be a hardship. The pros and cons of that have been under discussion for 160 years, and I would say they would be under discussion for the next 160 years, but the reason forbidding title by prescription against the United States is based on sound public policy, which to date Congress has not changed, and the objection which I made to the Irwin Case, in addition to those that I made, in view of counsel's statement that they are offering it to show a title by prescription, I make the objection that the record is not admissible in evidence on the theory that it will support their third equitable defense, which I consider title by prescription.

Mr. Olney: I did not desire to argue the matter, at all, I merely wished to make clear to your Honor the bearing of this evidence.

The Court: Yes.

Mr. Lipman: I do not know whether I made the formal offer of this letter of September 20, 1886, to Judge Rhodes, from the Acting Attorney General, but if I have not made that offer I wish to offer that as our next exhibit in order.

Miss Phillips: You offered it and I made the objection, and I think the Court reserved the ruling.

(The document was marked "Defendants' Exhibit 21.") (Set forth in Vol. III, page 204 of this printed Transcript of Record.)

Mr. Lipman: It is a very short letter, and I would like to read it to your Honor:

"Department of Justice, Washington,
20th September, 1886.

"A. L. Rhodes, Esq.
Counsellor at Law,
430 California Street,
San Francisco, Cal. [229]

"Sir: You will please sue out a writ of error in the case of S. F. Savings Union et al v. John Irwin, U. S. Circuit Court for the District of California.

"A writ of error being to be sued out by direction of this Department, no bond will be necessary (Vide §1001, Rev. Stat.).

"As to the cost of making out the transcript to accompany the writ of error, the authority of this letter will be sufficient to entitle the Clerk of the said Court to his proper allowances.

"Very respectfully,
Your obedient Servant,
W. A. JENKS,
Acting Attorney General."

Miss Phillips: I move to strike the letter read in evidence on the grounds previously urged.

The Court: The ruling is reserved.

Mr. Lipman: Now, in connection with our third defense, we wish to offer proof, among other things,

that a number of franchises for a toll road had been granted over the island which is called Island No. 1, and counsel very kindly consented that we did not need to prepare certified copies of the franchises. The first franchise I wish to offer is one dated March 1, 1926, issued to the Sears Point Toll Road Company by the County of Solano.

Miss Phillips: There is no objection on the ground of lack of certification; the same objection as I previously stated in relation to the testimony of several witnesses last Friday, that the proposed exhibit is immaterial, irrelevant, and incompetent, and not binding on the United States, does not affect the title of the United States.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 22.") (Set forth in Vol. III, page 205 of this printed Transcript of Record)

Mr. Lipman: I wish next to offer in evidence a franchise granted to the Sears Point Toll Road Company by the County of [230] Solano dated April 4, 1927.

Miss Phillips: The same objection, your Honor.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 23.") (Set forth in Vol. III, page 210 of this printed Transcript of Record)

Mr. Lipman: I shall next offer a franchise granted to the Sears Point Road Company by the County of Solano, under date of June 4, 1928.

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 24.") (Set forth in Vol. III, page 216 of this printed Transcript of Record)

Mr. Lipman: And, finally, I shall offer a franchise granted to the Sears Point Toll Road Company by the County of Solano under date of July 2, 1928.

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 25.") (Set forth in Vol. III, page 222 of this printed Transcript of Record)

Mr. Lipman: I think we also allege in our third defense that the lands involved in this suit were included within the boundaries of a reclamation district, and so I wish to next offer in evidence a certified copy of the order of the Board of Supervisors establishing Reclamation District No. 186.

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 26.") (Set forth in Vol. III, page 225 of this printed Transcript of Record)

Mr. Olney: If your Honor please, there are some witnesses to be called here whom we would like to call out of logical order, [231] but the point that we desire to prove is that following the Irwin judgment, for instance, the predecessors in interest of the defendants in this case went on this property, reclaimed it at very considerable expense, and cultivated it, and have been in possession of it ever since; that later on other portions of the property that had not been reclaimed were improved and expenditures made upon them, all without any objection being made by the United States, whatsoever. That later, after the patents were issued, there were further expenditures, that the Sears Point Toll Road Company constructed a toll road at large expense across the property; in other words, we desire to show at this time the expenditures made by these defendants in reliance upon the title which they claimed at the time. That evidence is to be taken in connection with the other evidence which has been put in and will be put in in connection with the other defenses, but it is in the line of the defense of equitable estoppel. I am making this statement so that your Honor will appreciate the bearing of the testimony and just what we have in mind. I think perhaps it is better to argue later whether such a defense can be made against the Government.

The Court: Yes, I agree with you on that.

Mr. Olney: I would merely say to your Honor this, that we have positive authority to the effect

that an equitable estoppel will lie against the United States, or against any State. This testimony which we desire to put in, in addition to what has already gone in, is simply as to the matter of expenditures, and I will say to your Honor in all frankness, I think that we appreciated right at the start that the Government, so far as our defendants are concerned, is not governed by any rules relating to res adjudicata, either in the Bouldin Case, or the Irwin Case for that matter, and the result of that was that we did not conceive or [232] obtain a clear conception as to this defense of equitable estoppel, but as the evidence went in we got to thinking about it, and we came to the conclusion that that defense would lie and it was good in this case. The responsibility is upon counsel. What I am leading up to is this, that we desire to offer as a further amendment to our answer a pleading that will set out this defense. It is not entirely finished yet, because we have been busy since court adjourned last week in getting it in shape, but it will be here in a few minutes. But my suggestion is that there, again, the matter of the bearing and significance of the facts, whether they will be sustained by the evidence, be held in abeyance, so to speak, and we be permitted to put in proof until the time to consider the matter of law arrives. As to the essential merits of the motion, there can be no surprise as far as the Government is concerned, and we think in the interest of justice and determining the case upon the merits we should be permitted to file this

amendment to our Answer, and also be permitted, in accordance with it, to introduce this evidence that I have indicated.

Miss Phillips: I do not know whether I should renew my last objection. I think our position throughout has been consistant on that.

The Court: I think you have made your position very clear, Miss Phillips, and I think, as suggested by Counsel, that all of this be understood, that the defense that he now speaks of would be established. The question of equitable estoppel is a very interesting one. It was argued before me at some length in the Walker River Case, and that case will probably go up on appeal. Many questions were presented in that case similar to this. It was contended that the Government invited entry upon the land bordering upon the Walker River, and that people had made improvements, that it has been in their possession for [233] a great many years, and under such circumstances it is contended that it would be inequitable to dispossess them. I held that it would. I think we may proceed with the understanding that when the case is finally submitted, the question may be fully presented, either orally or in briefs, and that thereafter I may rule upon the objections which have been presented, where I reserved rulings, and in that connection I do not hesitate to say to you that if I find that I erred in admitting any evidence I shall not hesitate

to change my ruling in that regard. I think we may as well proceed with that understanding. I think we understand what the Government's position is.

Miss Phillips: I think such plan of reserving a ruling is acceptable to both sides. Does the Counsel rest?

Mr. Lipman: Oh, no, we are going to put on the evidence.

The Court: I understand the defendants are going to offer an amendment to their Answer, and I also understand that they are going to offer further evidence.

Miss Phillips: Very well.

Mr. Lipman: It will be very brief.

The Court: You may proceed.

H. D. BUTLER,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Mr. Butler, what is your profession?

A. I am a consulting engineer, residing in Berkeley, with offices in San Francisco.

Q. What connection have you with the Sears Point Toll Road Company?

A. I am at present manager of the Toll Road, and have been since November, 1935.

Q. Are you familiar with its properties?

A. Yes.

(Testimony of H. D. Butler.)

Q. I will show you Defendants' Exhibit 3, which is the Napa [234] Quadrangle and will call your attention to an area marked Island No. 1 on that.

Miss Phillips: In the interest of expediting matters, I understand that counsel is now calling this witness to prove his defense of equitable estoppel?

Mr. Lipman: Yes.

Miss Phillips: May it be understood that I have an objection to all the testimony along this line offered in support of that?

The Court: Yes.

Miss Phillips: And an exception.

The Court: I understand, however, that counsel does not call this defense an equitable estoppel.

Miss Phillips: I think he did.

The Court: Is it an equitable estoppel?

Mr. Lipman: This defense, yes. Our third defense, I understood counsel for the Government to claim is a title by prescription, and this defense that we are going to file is strictly an equitable estoppel.

Miss Phillips: Then it is understood I make an objection to this evidence on the ground already stated, and the Court is reserving its ruling upon it, my objection being that the defense does not lie against the United States as a matter of law.

The Court: Yes.

Mr. Lipman: Q. What, if any, portion of the Sears Point Toll road is on Island No. 1?

A. 7.3 miles is its total length.

(Testimony of H. D. Butler.)

Q. Will you describe briefly that portion of the road that is on Island No. 1?

A. As I stated, it is about 7.3 miles in length. It is built mainly on a fill running from 5 to 8 feet in height. The roadbed is constructed about 30 feet wide on top and the paved portion of the road is about 24 feet wide. It is constructed of [235] crushed rock with an oil treatment.

Q. Does that road run from the approximate location of the present Navy Yard fence clear up to Sonoma Creek?

A. I don't know where the Navy Yard fence is, Mr. Lipman.

Q. I will have to get a map to show that.

A. This map does not show the location of the road.

Q. Will you describe between what points on the Island the road does run?

A. It runs from Napa River, Napa Creek, or Napa Slough, close along the shore of San Pablo Bay to a point somewhat north of Mare Island, where it crosses the Napa River—I should have said from Sonoma Creek.

Q. From Sonoma Creek. In other words, it runs from Sonoma Creek in a general southeasterly direction to a point north of Mare Island Navy Yard, where the road then crosses the Napa River?

A. Yes.

Q. Can you tell me when the road was constructed?

(Testimony of H. D. Butler.)

A. Construction was started sometime in the summer of 1926, summer or fall; it was completed and thrown open for traffic on July 4, 1928.

Q. Are the books of the company under your custody? A. Yes.

Q. Have you examined them to determine what the cost of construction of that portion of the road lying on Island No. 1 was? A. I have.

Q. Will you please state what the approximate cost was?

A. Somewhere between $180,000 and $190,000.

Q. Do you know when the Searls Point Toll Road Company acquired its right of way lands?

A. The first record in the books is early in 1926.

Q. I think that you said that the road was completed and was open for operation in 1928?

A. July 4.

Mr. Lipman: That is all.

Miss Phillips: No questions. It is understood that my objection has been made to all of this testimony? [236]

The Court: Yes.

JOHN B. COLEMAN,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Mr. Coleman, are you an officer of the Field & Tule Land Company?

A. The Field & Tule Land Company is disincorporated.

(Testimony of John B. Coleman.)

Q. Were you an officer of that company before its disincorporation? A. Yes.

Q. Can you tell me what the date of its disincorporation was, approximately?

A. Sometime within the last three years, about three years ago.

Q. I will show you a map which has been offered in evidence as Defendants' Exhibit No. 16, and ask you if you will indicate to the Court here the approximate location of the lands which were claimed by the Field & Tule Land Company?

A. Right here, about 500 acres.

Q. Are you familiar with those lands, Mr. Coleman? A. Yes.

Q. And you have been for a long time?

A. Yes.

Q. Can you state when the Field & Tule Land Company acquired those lands, approximately?

A. No, I have forgotten that; somewhere around twenty years ago.

Q. Something like twenty years ago?

A. Yes.

Q. Do you know what the company paid for those lands?

Miss Phillips: Now, your Honor, may I make an objection to the testimony of the witness along these lines? I understand that counsel is now offering this to show an equitable estoppel?

Mr. Lipman: Yes.

(Testimony of John B. Coleman.)

Miss Phillips: May it be understood that I have an objection to testimony along this line on the same grounds previously urged?

The Court: Yes. [237]

Mr. Lipman: I suggest that we understand that Miss Phillips' objection runs to all of the testimony to be given by the group of witnesses we are now going to put on to establish the defense of equitable estoppel.

The Court: I thought it was so understood?

Miss Phillips: I desire to make that objection as to the testimony to be given by each witness separately. I would be very glad to have that understanding.

Mr. Lipman: Yes, all of the witnesses. It will be so understood.

Q. Do you know what the company paid for the property, approximately?

A. I think it was either $25 or $35 an acre; I have forgotten exactly what it was.

Q. What is the property used for?

A. It was used as a duck club.

Q. Is it used for that purpose to-day?

A. Well, you might say yes, it is.

Q. Was it used for that purpose up until the time that your company disincorporated?

A. Yes.

Q. Are you familiar with the improvements which were constructed by that company upon the lands? A. Yes.

(Testimony of John B. Coleman.)

Q. Will you please describe, briefly, what those improvements consisted of?

A. Buildings, club house, garage, feed barn, tanks, a dock in the slough, a well, and quite a few miles of dredging work.

Q. Any roads? A. Yes, also a road.

Q. Were those improvements put in prior to April 22, 1930? A. Yes.

Q. Can you state the approximate cost of those improvements?

A. The buildings and tanks and barn cost approximately $15,000; the well cost between $2500 and $3000. The road was built jointly by ourselves and the Bay Land Company; our portion of the [238] road was probably quite a little longer than theirs; that road cost us between $2500 and $3000. I would say that the minimum cost of the dredging work was $15,000, it might have been $20,000 or more.

Q. Can you state whether that work was done since 1910? A. Yes.

Q. All of it? A. All of it.

Mr. Lipman: That is all.

Miss Phillips: No questions.

OLGA D. SIEVERT,

Called for Defendants; Sworn.

Mr. Lipman: Q. Miss Sievert, do you keep the books of the West End Land Company?

(Testimony of Olga D. Sievert.)

A. I do not at this time, but I did from 1923 until 1929.

Q. Under whose supervision did you keep those books?

A. Mr. Walter Sullivan, my employer.

Q. Was Mr. Walter Sullivan an officer of the company? A. Yes.

Q. What officer? A. Secretary.

Q. Are you familiar with the location of the lands of the West End Land Company?

A. By description only, not from actually seeing them.

Q. I will show you Defendants' Exhibit No. 16, and ask you if you will indicate to the Court the location of the lands of the West End Land Company?

A. I will have to refer to my books on that; there were so many acres in Napa County, and so many acres in Solano County, and after eight or nine years one forgets just how many.

Q. I don't mean the exact number of acres; can you identify on the map the location of the lands?

Miss Phillips: I don't object to your leading the witness on this, Mr. Lipman. [239]

A. I probably could not identify them on the map. I have a description in my books as 472 acres in Napa and Solano Counties.

(Testimony of Olga D. Sievert.)

Mr. Lipman: I will show it to your Honor. It is the tip of land on the westerly or most northwesterly point of what we have been referring to as Island No. 1. I just want your Honor to have that point in mind.

Q. Do your books show when the West End Land Company acquired that land?

A. In March, 1923.

Q. How much did the company pay for those lands? A. For the land itself $27,000.

Q. Do your books show what improvements have been placed upon the land by the company since its acquisition of the property?

A. Yes, we have it grouped as house, landing—

Q. State what the improvements were and the cost of them.

A. As of what date? I have them here as of several dates. The time I stopped keeping the books was November, 1929, and I have them as of that date, if that will be satisfactory.

Q. That will be all right. Just give them as of that date.

A. House, $9180.10; house contents, $2104.6[illegible] landing, $1288.03; levees and flood gates, $9029.21; all others we have grouped under one account, called "Permanent Improvements," $6399.72.

Q. And all those expenditures were made prior to the time when you ceased keeping the books in 1929? A. Yes.

Mr. Lipman: That is all.

Miss Phillips: No questions.

MYFORD IRVINE,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Are you a son of James Irvine? A. I am.

Q. Are you employed in your father's office?

A. I am.

Q. Do you assist in the management of his properties? A. I do. [240]

Q. Do you know the island that is known as Cross Island? A. I do.

Q. Referring now to this map of 1925, which is Defendants' Exhibit 16, will you point out the areas owned by your father?

A. The area generally bounded by the South Slough, to the southwest of that slough, over to the property owned as shown on this map by Osborne.

Mr. Lipman: The witness indicates that portion of Island No. 1 lying to the north of the present Navy Yard fence up to the half section line running north and south, through Section 31 in Township 4 north range 4 West and Section 6 in Township 3 north range 4 west.

Q. Do you know when your father acquired those lands? A. In the fall of 1928.

Q. Do you know how much he paid for them?

A. Approximately $100,000.

Q. Did that acquisition also include the island lying between Dutchman's Slough and South Slough, and Napa Bay or River?

A. Yes, it did.

(Testimony of Myford Irvine.)

Q. Do you know what improvements your father has placed on those lands since his acquisition of them and prior to April 22, 1930?

A. The work actually done and the work under contract which had been started, in other words, April 22, 1930 there had been certain work which had been contracted for and was under way but not completed at that time.

Q. Will you state what those improvements consist of?

A. Drainage ditches, levees, filling in the sloughs, squarring up the fields for farming.

Q. Can you state how much money was expended for those improvements? A. About $26,000.

Mr. Lipman: That is all.

Miss Phillips: No questions. [241]

GEORGE CROSS,

recalled for defendants.

Mr. Lipman: Q. Mr. Cross, you have already been sworn as a witness and have testified in this case to the fact that your father put in levees around Island No. 1. Do you know how long it took to put in the levees around Island No. 1?

A. Yes.

Q. Will you please state how long it took?

A. Two years.

Q. Will you state what those levees were actually put in with, what the equipment was?

(Testimony of George Cross.)

A. With a clam shell dredger.

Q. How large a dredger?

A. If I remember correctly, the bucket was a 2-yard bucket; I think the hull of the boat was 40 by 80 feet.

Q. How much of a boom?

A. At times they used a 100-foot boom and a 120-foot boom.

Q. Did your father own the dredge?

A. He owned an interest in it.

Q. By whom was the dredge owned?

A. By a group of land owners in the old Sargent Ranch, up near Lodi, California.

Q. Will you state, if you know, what arrangements your father made for the use of that dredge for this purpose? A. He agreed to rent it.

Q. Upon what basis?

A. He was to pay $350 a month for it.

Q. Did that amount include the cost of operation, the men on the dredge, the fuel, or whatever was consumed?

A. No, that just included the rent of the dredge.

Q. Will you state, if you know, what the cost of the operation was?

A. The pay-roll of the crew was $500 a month. Their board was $100 a month. The coal, gasoline, oil, and other miscellaneous supplies was $1200 a month. The repairs and replacements were $150 a month. The repairs consisted of new booms and new chains and new spuds.

(Testimony of George Cross.)

Q. Were any flood gates put in on the Island?

A. Yes. [242]

Q. Will you state what those cost?

A. There were eight flood gates at an average cost of $250 each, or a total of $2000.

Q. Were there any buildings on Island No. 1?

A. There were five sets of buildings erected on Island No. 1 at a cost of $1600.

Q. Were there any windmills or improvements of that character?

A. Yes. There were six wells with proper casings in them, windmills and tanks; they cost on an average $300 apiece, or a total of $1800.

Q. Was any money expended either in building or surfacing roads?

A. Yes, we worked on that constantly. I figure that we spent $1600 on it.

Q. How about drainage ditches?

A. On drainage ditches we spent about $1400.

Q. Were there any other miscellaneous expenses in the way of improvements?

A. Yes, another item of expense in there, the dredger was used originally on a fresh water proposition development, and when my father arranged to take it down there he agreed to make the necessary repairs and changes on it in the way of putting in condensers and new boilers, which cost $2000.

Q. That was so that they could use salt water?

(Testimony of George Cross.)

A. Yes. Then there was a towage bill of about $300 for moving the dredger back and forth.

Mr. Lipman: That is all.

Miss Phillips: No cross examination.

The Court: Q. What was the total expenditure for improvements?

A. $80,300.

Q. That included building the levees?

A. Everything.

Q. What was the population of that island?

A. It was just our own families, Judge; I would say that the farmers living there, and the men, and the workmen, and everything, would make an average population of 50. [243]

Q. Was that land all used for farming?

A. Yes.

Q. What did you raise on the land?

A. We had raised barley, wheat, oats, hay. We had some stock, like hogs, probably 800 hogs a year, and a couple of hundred sheep. One year we pastured 7000 head of sheep on the stubble. We always had 200 head of sheep; also we had about 240 head of cattle.

Mr. Olney: Q. Mr. Cross, is your father living?

A. No.

Q. Do you know what has become of his papers?

A. They were all scattered, burned or destroyed, as far as I know.

Mr. Olney: That is all.

Miss Phillips: No cross examination.

(Testimony of George Cross.)

The Court: Q. Who occupies the land now?

A. I could not say, Judge, I have not been there for several years.

Mr. Olney: If your Honor please, Miss Phillips has kindly furnished us with a copy from the files of the Navy Yard of a letter written by Mr. L. E. Cross, under date of December 5, 1896, to Admiral W. A. Kirkland, Commandant of Mare Island Navy Yard. I would like to introduce this letter in evidence. I suggest that instead of putting in the copy as an exhibit we just read it into the record.

Miss Phillips: I have no objection to reading it into the record, that is, I mean reading it in or putting it in, but I want it understood that my objection is still running to all this line of evidence.

The Court: Yes, that will be the understanding.

Mr. Olney: The letter reads:

"Office of
Drs. L. E. & S. N. Cross
42 E. Main St.

Stockton, Cal. Dec. 5th, 1896.

"Sir:

"I intend within the next thirty days to begin the reclama- [244] tion of the tule land north of the Government boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I

may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Depmt to do the work for me, which he refuses to do without your knowledge and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine.

"Very respectfully,

L. E. CROSS.

"To Admiral W. A. Kirkland,
Commandant Mare Island Navy Yard."

I desire to introduce in evidence in the same general manner, that is, by reading it into the record, a copy of a letter of December 11, 1896, written by W. A. Kirkland, Rear Admiral of the United States, Commandant of the Navy Yard, addressed to L. E. Cross. This copy is found in the Transcript on Appeal to the Supreme Court of California in the case of L. E. Cross v. H. B. Mayo. The only foundation we could lay for this is the foundation just laid previously when the witness Cross was on the stand in regard to his father's papers being dispersed and lost. Furthermore, in that connection it seems to me very material as bearing upon the use of a copy of this letter that this letter was written over forty years ago, and the Government has waited all of this time before making any such issue as it now makes in this case. Under those circumstances, every leniency should be exercised in permitting the introduction of secondary evidence in a case of this character.

Miss Phillips: Your Honor, I wish to make an objection to receiving the letter in evidence on the ground that no foundation has been laid; on the further ground that the letter has not been authenticated; on the further ground that it is hearsay, and [245] on the further ground that it is taken from the record of an action not between the same parties. Counsel's reference to the fact that this was forty years ago and therefore a liberal rule should be adopted by the Court, I take leave to direct the attention of your Honor to the fact that counsel made objection to my evidence of matters occurring in 1853. He objected to it as hearsay. If evidence happening in 1853 is not old enough to permit the Court to adopt a rule of liberal construction as to hearsay, certainly a record made in 1896 or thereabouts is very, very youthful.

The Court: Objection overruled.

Miss Phillips: Exception.

Mr. Olney: I will read the letter from the transcript:

> "In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein."

That is signed by W. A. Kirkland, Rear Admiral of the United States, Commandant of the Navy Yard.

Miss Phillips: I move to strike the letter on the ground that no foundation has been laid, it is hearsay, the original is not produced or its loss explained. On the further ground that the letter is immaterial, irrelevant, and incompetent, and cannot affect the title of the United States.

The Court: Motion denied.

Miss Phillips: Exception. [246]

Mr. Lipman: For the time being, your Honor, that is all the evidence we have along that particular line. Now I wish to go back to some of the evidence that we ordinarily should have put in prior to this testimony. In our third defense we allege the issuance of the Patent No. 72 in 1896, Patent 152 in 1910, and then we allege that application was made for patenting of the remainder of the swamp lands in Survey 569, and in that connection that the Secretary of the Interior wrote to the Secretary of the Navy to get the data of the Navy Department on that. We wish to offer now certified copies of the letters in proof of that statement. The first letter I wish to offer is a certified copy of a letter dated October 18, 1912, to the Secretary of the Navy, from the First Assistant Secretary of the Interior, reading as follows:

"Sir:—I have the honor to enclose a copy of letter 'E' from the Commissioner of the General Land Office dated September 22, 1905, addressed to the Secretary of the Interior in regard to Mare Island in California"—by the way, that letter, I believe, is in evidence—"also a copy of letter dated October 8, 1912, from the Commissioner, addressed to Hon. Julius Kahn, at San Francisco, California, relative to listing certain lands in T. 4 N., R. 4 W., M. D. M., California, as swamp and overflowed lands for approval by this Department.

"As it appears that some of the lands are in conflict with what is known as Mare Island, I have the honor to request that such data as may be in your possession relative to the limits of the land embraced in the island be forwarded to this Department for the use of the General Land Office, to the end that the matter of segregating the swamp and overflowed lands from said island may be considered.

"Very respectfully,
SAMUEL ADAMS,
First Assistant Secretary." [247]

Might I ask that that letter be marked our next exhibit?

(The document was marked "Defendants' Exhibit 27.") (Set forth in Vol. III, page 232 of this printed Transcript of Record.)

I now wish to offer in evidence a letter in reply to the one just read. This is a letter dated February 1, 1913, from the Acting Secretary of the Navy to the Secretary of the Interior. I shall not read the entire letter, but I wish to read a portion of it to your Honor:

"Sir: Referring to your letter of October 18, 1912, in which you request certain information in regard to the boundaries of the naval reservation at Mare Island, Cal., I have the honor to advise that the Commandant, navy yard, Mare Island, has submitted the following report covering such information as the files of his office afford:

"Originally all of the tule land adjoining and to the north of Mare Island was claimed as part of Mare Island. This tule land, had, however, been sold by the State and the question as to the ownership of about 7413 acres was taken to court and Justice Field decided in the case of the San Francisco Savings Union and others versus Irwin in the Circuit Court, District of California, July 8, 1886, that title to the land in question rested with individuals who had purchased it from the State. (See 28 Fed. 708). All of the land originally claimed as Mare Island coming in township 4 North, range 4 West, Mt. Diablo meridian, was covered by this decision. This decision was afterwards confirmed by the Supreme Court of the United States. See 136 U. S. 578.

"There is forwarded herewith blue print of plan R-212 which shows the present limits of Mare Island. There is no question as to the title of all of the high land on Mare Island, but to the north of this high land the section shown as swamp and over-flowed land survey 34 with accretions thereto, is in dispute. Survey 34 extends from high land of Mare Island to the southern limits of the land [248] covered in the decision in the case of the San Francisco Savings Union and others versus Irwin. Title to swamp and over-flowed land covered by survey 34 and accretions thereto, is claimed by E. H. Sawyer and the case of Sawyer versus Osterhaus was heard before Judge Val Fleet of April 26, and 27, 1912, in the Circuit Court, District of California. Decision has not yet been handed down."

I think that is all of the letter I wish to read at this moment, because I am going to offer the whole letter in evidence. If counsel wishes to read the balance of the letter it may be done. The letter is finally signed by Philip Andrews, Acting Secretary.

Miss Phillips: The objection that I have to make to that letter—I think now that you have reached a point where equitable estoppel is involved—

Mr. Lipman: This letter and the letter immediately preceding deal strictly with our third defense.

Miss Phillips: The objection I am making to the letter that counsel is offering in evidence is that it is not binding on the title of the United States, that it is immaterial, irrelevant, and incompetent.

The Court: Overruled.

Miss Phillips: Exception.

Mr. Lipman: May this letter be marked our exhibit next in order?

The Court: Yes.

(The document was marked "Defendants' Exhibit 28.") (Set forth in Vol. III, page 234 of this printed Transcript of Record.)

Mr. Lipman: I find, your Honor, that in these certified copies of maps of Solano County I have offered the negatives instead of the positives, and I wonder if I could put the positives in evidence instead of the negatives, they are much clearer.

The Court: Very well. [249]

Mr. Lipman: And have the Clerk put the marks on them instead of on the negatives.

The Court: Very well.

Mr. Lipman: I next wish to offer in evidence a certified copy of the blueprint R-212, which accompanied the letter I last offered in evidence. I would like to show it to your Honor, particularly in connection with the statement in the letter just read that this shows the then present limits of Mare Island.

Miss Phillips: I make objection, your Honor, to the introduction of this exhibit in evidence on

the ground it is immaterial, irrelevant, and incompetent, and does not affect the title of the United States, and on the further ground that the exhibit, together with the accompanying letter, amounts to an offer of an opinion of the Acting Secretary, upon a question of law, which is not within his province.

The Court: Overruled.

Miss Phillips: Exception.

(The blueprint was marked "Defendants' Exhibit 29.") (Set forth in Vol. IV, page 50 of this printed Transcript of Record.)

Mr. Lipman: The Government in this case has offered in evidence the Freeman Survey and a number of letters and other documents which it is claimed show approval of the Freeman Survey, and at the time I objected both to the survey and to the accompanying letter on the ground that not only did they not show approval, but they affirmatively showed disapproval, and I still rely upon that objection as entirely sound, but in addition to that we have some further evidence which further demonstrates that the Freeman Survey was never approved and never acted upon as an approved survey, and I wish now to offer in evidence that material. Some of these letters are taken from the record in the O'Donnell Case; Miss Phillips very kindly agreed that objection would not be made on the ground that they had not [250] been re-certified. The first of these letters is a letter dated

July 25, 1879, from the Acting Commissioner of the General Land Office to the Surveyor General, in San Francisco. The purpose of this letter and several of these letters is merely to give what we believe to be a background for what took place when Wagner finally sent the Freeman Survey plat, field notes, and accompanying papers to the Land Office.

Miss Phillips: My objection to this exhibit which counsel now proposes to put in—are you proposing to put them in as one exhibit?

Mr. Lipman: No, as single exhibits.

Miss Phillips: I make the same objection to all of them, not on the ground of lack of certification or true copies—I think they are true copies—but our position is that a two-year period elapsed after Freeman's Survey was completed and filed, and that no objections were filed, and under the practice of the Land Commissioner at that time, as shown in the case of Tubbs v. Willhoit, lack of objection being made within the time required by law made the approval of the Land Commissioner follow as a matter of practice and of law. The objection which was filed and which counsel now will show by the group of letters which he is offering came approximately two years after that survey had been completed without objection, and our position is that it was too late, and, therefore, I make the objection to each of these letters on the ground that they are immaterial, irrelevant, and incompetent, and that the objection which they

show was too late. If I may have that objection run to all of these it may save a little time and we can finish this morning.

Mr. Lipman: I don't know that we can finish this morning, but I want to specifically reply to that argument, because I think it is important for the Court to understand what our position is. [251] The Freeman Survey was made and was filed with the Surveyor General, who at that time was Mr. Ames. Mr. Ames never returned the survey to the Land Office, as required by Statute. As a matter of fact, he could not have, because he went out of office before the time when, as a matter of law, the survey would have been returned under the statute; he simply could not have done it, because he was not surveyor general then. He did send back a tracing of it with Freeman's account, as required by the statute, so Freeman could be paid. The statute required that the surveyor's account be accompanied by a copy of the plat, so that he could be paid. The field notes were not sent back. The survey was made under the Act of 1864; that Act expressly required that both the field notes and the plat be returned to the General Land Office for approval by the Commissioner, and all the authorities under the Statute of 1864 are that until the Commissioner of the General Land Office approves the survey in the manner required by the statute it has no official standing whatever. Miss Phillips has referred to the case of Tubbs v. Willhoit. She knows, of course, that that did not in-

volve a survey under the Act of 1864; it was nothing but an ordinary township plat, and that in the old days township plats did not require the approval of the General Land Office, at all. Later that practice was changed, so that it did require the approval of the Commissioner of the General Land Office before they could be approved. There is nothing either in that statute or in the ruling that brought about that change that required the approval to be shown on the face of the survey, as the Act of 1864 expressly required. After Ames went out of office he was succeeded, I believe, by Surveyor General Rollins, which was sometime about November, 1877. The evidence we are going to offer will show that in the spring of 1877 Rollins became sick and died. Rollins at no time returned the Freeman Survey [252] to the General Land Office. He neither submitted a plat or the field notes. So there the matter stood until 1879, when a man by the name of Hanley filed a protest against the Freeman Survey, both in the General Land Office and with the Surveyor General, whereupon the Land Office wrote to the then Surveyor General, who at that time was Wagner, and the letter that I have just offered in evidence reads as follows:

"You are requested, immediately upon the receipt hereof, to forward to this office, a copy of the final confirmation of Mare Island to G. W. P. Bissell and William P. Aspinwall,

by the District Court, said confirmation bearing date March 2, 1857. Also description of limits. Has the Island been surveyed?".

Obviously the Commissioner did not even know the survey had been made at that time. That is the first letter which I wish to offer.

The Court: The objection is overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 30.") (Set forth in Vol. III, page 239 of this printed Transcript of Record)

Mr. Lipman: The next letter is a letter dated August 7, 1879, from the Acting Commissioner to the Surveyor General, which reads as follows:

"Referring to letter from this office dated the 25th ultimo"—which I have just read—"requesting information upon the subject of Mare Island, California, I have also to request that if there is in your office a plat and notes of the survey of said island, made or approved by Government officers, you will cause to be prepared and forwarded to this office a copy of such survey."

—indicating very clearly that he wants to see what this survey is that Mr. Hanley is protesting against: I offer that as our next exhibit.

Miss Phillips: The same objection. [253]

The Court: The same ruling.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 31.") (Set forth in Vol. III, page 240 of this printed Transcript of Record)

Mr. Lipman: I offer next—I happen to have a certified copy of the next letter, which is Surveyor General Wagner's response to the first letter received by him from the Acting Commissioner. It happens to be dated August 7, 1879, which is the same date as the second letter was written, and he says in referring to it, that he sends back now for the first time the field notes, together with the plat and copies of the notice of publication and accompanying papers, and then he says:

"I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138," and on the Freeman plat, if your will draw a line across those two stations, it is right across the northerly end of the high land. I offer this as our next exhibit.

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 32.") (Set forth in Vol. III, page 241 of this printed Transcript of Record)

The Court: Point to that again.

Mr. Lipman: Let me get the Freeman map and I will show it to you from that.

Miss Phillips: Counsel's suggestion is that it is right here; that would exclude Swamp and Overflow 34 from the Government ownership. That is Wagner's idea of the line.

Mr. Lipman: I next want to offer in evidence a copy of the Hanley protest to the Surveyor General, dated July 5, 1879. [254]

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 33.") (Set forth in Vol. III, page 244 of this printed Transcript of Record)

Mr. Lipman: Then I wish to offer the Hanley protest which is dated July 16, 1879, addressed to the Commissioner of the General Land Office.

Miss Phillips: The same objection.

The Court: Overruled.

Miss Phillips: Exception.

(The document was marked "Defendants' Exhibit 34.") (Set forth in Vol. III, page 251 of this printed Transcript of Record)

Mr. Lipman: I wish to offer an excerpt from the Congressional Record, I believe it is, containing an excerpt from the report of the Surveyor General in 1878, which shows the sickness and death of Surveyor General Rollins.

Miss Phillips: No objection.

(The document was marked "Defendants' Exhibit 35.") (Set forth in Vol. III, page 255 of this printed Transcript of Record)

Mr. Lipman: I next wish to offer in evidence a letter dated February 28, 1921, to the Surveyor General of San Francisco, from the Acting Commissioner.

Miss Phillips: Objected to as immaterial, irrelevant, and incompetent, and not affecting the conclusion that if the Freeman Survey was in fact approved in 1877 or thereabouts the letter of 1921 would not change the result in that behalf.

Mr. Lipman: And, on the other hand, inasmuch as the claimed approval is by inference it certainly throws a very strong light upon the question, to get the views of the Department, itself, as to whether it had by acquiescence or in any other way approved the Freeman Survey.

The Court: Overruled.

Miss Phillips: Exception. [255]

(The document was marked "Defendants' Exhibit 36.") (Set forth in Vol. III, page 257 of this printed Transcript of Record)

Mr. Lipman: I should like to read the following from it:

"It further appears that the survey by Freeman was not approved by Surveyor General Ames, the copy of the plat received with his letter dated No-

vember 5, 1877 being merely certified as correctly copied from the original on file in his office."

This is the Land Office's own statement, that they did not regard it as approved. I neglected in connection with the previous letters that went back and forth between the Secretary or the Assistant Secretary of the Navy and the Secretary or Assistant Secretary of the Interior to offer two further letters that bear directly on the allegations of our answer. Our allegations were to the effect that after this other exchange of correspondence the Land Office handed down a decision that the lands lying in Survey 569 that had not already been patented should be patented. That was followed up by a letter directing a survey that would close the line of 569 on the present Navy Yard fence. I wish to offer in evidence those two letters.

Miss Phillips: Objected to on the ground that the issuing of a patent upon the land in controversy, and the preliminaries for the issuance of that patent, are beyond the jurisdiction of the Land Office. That, your Honor, is strictly a question of law which can be briefed. Of course, the fundamental basis on which the Government sues to set aside a patent is that the Land Office has no jurisdiction to patent lands save lands that are within the public domain of the United States. If this land in fact was not public domain, then the patents were void, and the correspondence and all the preliminaries to the issuance of a patent would fall with the patent.

The Court: Objection overruled.

Miss Phillips: Exception. [256]

Mr. Lipman: The first letter is a letter dated August 17, 1923, Decision 28814, entitled "Motion for rehearing." It is signed by E. C. Finney, First Assistant Secretary.

(The document was marked "Defendants' Exhibit 37.") (Set forth in Vol. III, page 260 of this printed Transcript of Record)

Then the instruction, directing the Survey to be made, and the closure on the line of the present Navy Yard fence.

Miss Phillips: The same objection.

The Court: Objection overruled.

Miss Phillips: Exception.

Mr. Lipman: This letter is dated September 19, 1923, addressed to the Surveyor General, San Francisco, signed by the Assistant Commissioner.

(The document was marked "Defendants' Exhibit 38.") (Set forth in Vol. III, page 266 of this printed Transcript of Record)

In connection with the suggestion that any authority, such as Tubbs v. Willhoit, or other authority pertaining to township plats has any bearing whatever on a survey under the statute of 1864, and particularly in view of the fact, as I recollect it, that it was suggested in the O'Donnell case that when the practice in the Land Office was changed so that the plats could not be filed as approved until approved by the Land Office, I have obtained a

copy of the circular which was written by the Commissioner to the various Surveyors General, ordering that that practice be adopted. The purpose of this is to show that there is nothing in the ruling whatever which requires an endorsement of approval on the survey or plat as is expressly required by the Statute of 1864 with reference to surveys under that statute. I offer this as our next exhibit in order.

(The document was marked "Defendants' Exhibit 39.") (Set forth in Vol. III, page 271 of this printed Transcript of Record).

We have also alleged in our answers that the State of California ceded jurisdiction over Mare Island, meaning the high land, to the United States. This cession was by statute passed in [257] 1854, which limited the cession to the lands to the south and southeast of the northerly end of the high land. In that connection the Attorney General of the United States wrote a letter to the Governor of the State of California, pointing out that before the United States could spend money on improving Mare Island it would be necessary for him, the Attorney General, to certify to the title of the United States. He suggested a cession by the State of California of certain swamp and tide lands to the Government to clear up what was thought to be a possible difficulty in the title, all of which is referred to in that long opinion that your Honor is undoubtedly familiar with by Attorney General Cushing.

I want to offer in evidence as bearing on the scope of what was Mare Island and what was accepted as a satisfactory cession in compliance with that request, certified copies of the letters.

(The documents were here marked "Defendants' Exhibit 40.") (Set forth in Vol. III, page 273 of this printed Transcript of Record)

I would like to ask your Honor to take the noon recess now. We will have very little more evidence. I want to have Mr. Stewart here to testify to the purchase by Mrs. Stewart of a piece of land. Also I think I will have one more brief piece of testimony and then we will be through.

The Court: Will the Government have any further evidence?

Miss Phillips: Just a few papers, your Honor. I am sure that I can finish in five minutes. It may be possible that we can handle by stipulation the matter that Mr. Lipman wants to present.

Mr. Lipman: Yes, I think that perhaps we can handle it by stipulation. I expect to have Mr. Stewart testify that on behalf of Mrs. Stewart he arranged for the purchase of a portion of Survey 569. He can state how much was paid for it. Perhaps we could produce a letter from Mr. Stewart setting forth how much he paid for it, and the piece he purchased. Perhaps that would be accepted by Miss Phillips in lieu of his testimony. That would be, [258] of course, subject to the general objection

that Miss Phillips has made to the other testimony.

Miss Phillips: Yes, I was going to make the suggestion that perhaps we could handle that by letter.

Mr. Olney: If your Honor will permit me to make a statement, I talked to Mr. Stewart over the telephone this morning. The land in question is the land that belongs to Mary Stewart, his wife. As I memember it, he told me he paid $16,000 or $18,000 for that piece of land.

Miss Phillips: Then subject to the objection which I made previously to all the evidence on the line of equitable estoppel, I will stipulate that Mr. Stewart, if called, would testify that his wife paid —how much did you say—shall we split the difference and say $17,000; is that what you want?

Mr. Lipman: The fact is that Mr. Stewart at one time owned all of the piece that is now owned by James Irvine. Frankly, I am not sure whether that purchase price refers to the whole piece. I suggest that we get a letter stating what the price was, and we can stipulate that Mr. Stewart, if called, would so testify.

Miss Phillips: I think that counsel and I can arrange that matter by stipulation. I am very sure that we can.

Mr. Lipman: Then let that be the understanding.

The Court: Very well.

Mr. Lipman: Then the only other testimony is that the pieces of land owned by the West End Land Company, the Field and Tule Land Company, and the Bay Land Company, and Mary Stewart and

James Irvine, that as to those pieces of land the title has been insured. We wish to call people from the Title Company to testify that they would not have issued title insurance on that land unless patents had been issued. Perhaps it will be stipulated that they would so testify, subject, of course, again, to your general objection, Miss [259] Phillips.

Miss Phillips: I will so stipulate, your Honor.

Mr. Lipman: I will have to have Mr. Stewart's testimony as to the date of that purchase. I don't know when it was.

Miss Phillips: We can cover that by stipulation, too. Suppose it will be understood, your Honor, that between counsel and myself we will sort of fix up the record on that point in order to make it clear.

Mr. Lipman: That will be satisfactory.

Mr. Olney: All, or nearly all, including the Stewarts, purchased the land after the patents were issued.

Miss Phillips: Well, I presume that will be part of the detail that will be stipulated to between counsel and myself.

Mr. Lipman: Now, I wish to offer the four township plats that cover the four townships that are involved in this suit; in other words, Townships 3 and 4 in North range 4 west and Townships 3 and 4 in North range 5 west. Those are the approved plats on the basis of which the patents issued. The first one will be the plat of township 3

north range 5 west M.D.M. We ask to have that marked our Exhibit next in order.

(The plat was marked "Defendants' Exhibit 41.") (Set forth in Vol. IV, page 51 of this printed Transcript of Record)

The next one is Township 4 north range 5 west M.D.M.

(The plat was marked "Defendants' Exhibit 42.") (Set forth in Vol. IV, page 52 of this printed Transcript of Record)

The next is Township 3 north range 4 west M.D.M.

(The plat was marked "Defendants' Exhibit 43.") (Set forth in Vol. IV, page 53 of this printed Transcript of Record)

The next one is township 4 north range 4 west M.D.M.

(The plat was marked "Defendants' Exhibit 44.") (Set forth in Vol. IV, page 54 of this printed Transcript of Record)

I should state that the particular purpose of that offer is to show that the lands here involved were sectionized, which, of course is inconsistent with any thought of the Land Department that there was a valid Freeman Survey. [260]

We rest, your Honor.

Miss Phillips: I offer in evidence a certified copy from the Coast & Geodetic Survey records a description of Triangulation Station Sonoma Pole. This is a description as of 1885, showing the triangulation station at the junction of Sonoma and Napa Creek, showing the presence of Government signs claiming the land as Government property.

Mr. Lipman: I object to the offer, generally, on the ground that it is immaterial, irrelevant, and incompetent. The Government was not in possession and it was not Government property.

The Court: Objection overruled.

Mr. Lipman: Exception.

(The document was maked "U. S. Exhibit Y.") (Set forth in Vol. IV, page 32 of this printed Transcript of Record)

Miss Phillips: Also a certified and photographic copy of an entry in an official log of Mare Island dated November 15, 1873, showing the erection of buildings at described places in the tule land on that date.

Mr. Lipman: I object to that, your Honor, because that is in connection with our old friend, the Sanger Report. The buildings, I believe, were put up just two days prior to this report. It is purely self-serving. The effort was very obviously an effort to build up a case.

The Court: What is the date of this?

Mr. Lipman: This is dated November 15, 1873. I think you will find that the Sanger Report is of November 17, 1873.

Miss Phillips: I don't just remember the date, but it is very close in point of time. This is an assertion of title, your Honor, and of possession.

The Court: Objection overruled.

Mr. Lipman: Exception. [261]

(The document was marked "Defendants' Exhibit Z.") (Set forth in Vol. III, page 183 of this printed Transcript of Record)

Miss Phillips: I offer in evidence, or will read in evidence, a criticism of one of the maps which the defendants offered in evidence the other day. I don't know what the exhibit number of the map was, but it is the State Map of 1853 or 1854; the record will show the exhibit number. I am referring to Senate Document No. 5, Session of 1855, which was the State Surveyor General's Report of 1854. That is a criticism of that map as being worthless on account of its inaccuracy.

Mr. Lipman: I don't remember offering that map. I didn't think I offered the State Map.

Miss Phillips: I thought you did. If you did not then this exhibit should be excluded.

Mr. Lipman: I am very sure I did not offer that map that you are referring to. Have you any idea what the exhibit number is?

Miss Phillips: I have lost track of the exhibit numbers. I will say, your Honor, that if that map is not in then this criticism is not properly in.

Mr. Lipman: May you and I check that, Miss Phillips, and find out whether it is in evidence?

Suppose we have this understanding, that if we find that that map is not in evidence then this will not be offered; if it is found that the map is in evidence then this can be handed to the Clerk and given an exhibit number.

Miss Phillips: That will be satisfactory.

The Court: Then that will be the understanding.

Miss Phillips: That closes my case. I would make the suggestion that in the interest of everybody it might be well to diminish the number of exhibits if we can. There is a duplication of one exhibit. The large framed aeroplane map is identical with the map placed in evidence with the transparent map to fit over it, save for the scale. May I suggest that this [262] large aeroplane map, Exhibit I, be withdrawn? Wherever the record shows witnesses testified in accordance with the aeroplane map the testimony can be considered as relating to the second aeroplane map, which is Exhibit V, I think it is. Anyway, it is the second aeroplane map that was put in.

Mr. Lipman: That will be satisfactory. As a matter of fact, the other day Captain Carlson and I transferred the letters on that map to the other one, so that the big one may be withdrawn.

Miss Phillips: I was going to make the suggestion that that be done. The Government rests.

Mr. Olney: Your Honor, I would like to have you take a recess now until two o'clock. We probably will have no further evidence. However, there

may be a few brief points I would like to present after doing a little checking.

The Court: Very well, we will be in recess until two o'clock.

(A recess was here taken until two o'clock p. m.)

[263]

Afternoon Session.

Mr. Lipman: May it please the Court: I find that the copy of the patent that we offered in evidence as Patent No. 152 is, perhaps, not an exact copy. Miss Phillips has a certified copy from the Land Office. It is agreeable that the two we have filed, and which were our Exhibit 7, be withdrawn and this one marked as our Exhibit 7.

(The document was here marked "Defendants' Exhibit 7.") (Set forth in Vol. III, page 192 of this printed Transcript of Record)

Miss Phillips: That arrangement is agreeable to me.

Mr. Lipman: I find that through oversight I did not put on our proof in support of our defense of equitable estoppel as regards the Bay Land Company. I would like now to call Mr. Heyer.

W. C. HEYER,

Called for the Defendants; Sworn.

Mr. Lipman: Q. Mr. Heyer, are you an officer of the Bay Land Company? A. I am.

Q. What officer? A. President.

Q. I will show you Defendants' Exhibit No. 16, and will ask you to indicate to the Court the location of the lands of the Bay Land Company.

A. This part, in here, from here over to here.

Mr. Lipman: The witness points to an area marked on this map "Bay Land Co. 402.40 acres."

The Witness: Altogether it is 631 acres; some are in Napa and some in Solano.

Mr. Lipman: Yes, in Napa County, 228.1 acres.

Q. Can you state when the Bay Land Company aequired that land? A. In 1920.

Q. Do you know what the company paid for it?

A. About $35 an acre.

Q. Are there any improvements on the land?

A. There are. [264]

Q. Will you state to the Court, briefly, what those improvements consist of?

A. The total improvements amount to about $22,540, consisting of culverts, $1413; levees, $6933; well boring, $1442; casing for the well, $1112; pump, $383; the building of a dam for culverts, $628; the dredging of the slough inside, $600; tanks, $161; fresh water tank, $250; piling for a warehouse, $125; the cost of the building, $7825; the road from the highway to our place, one-half of the cost was

(Testimony of W. C. Heyer.)

$663.42, the other half being paid by the Field & Tule Club, although the road is on our land.

Q. Were those improvements *put* in prior to April 22, 1930? A. They were.

Q. All of them?

A. Yes, up to 1927, I think it was.

Q. Those improvements were all put in since the land was acquired in 1920, and prior to 1930?

A. Yes.

Mr. Lipman: That is all.

Miss Phillips: No cross-examination. It is understood, of course, that this testimony has all come in under the objections previously urged.

The Court: Yes.

Mr. Lipman: I don't think it appears in evidence yet—if it does I don't recall it—what the acreage is from the north end of the high land south.

Mr. Olney: I was just talking to Captain Carlson about that. May I ask Captain Carlson to take the stand for a minute?

CARL A. CARLSON,

Recalled for Defendants.

Mr. Olney: Q. Captain, approximately what is the acreage—I don't care for the exact acreage, but approximately what is the [265] acreage of what we will call the dry land, or the high land, in Mare Island?

(Testimony of Carl A. Carlson.)

A. The original report of the Sloat Board says about 900 acres; I think, however, that includes also the marsh on the east of the high land, in front of the present hospital. So I think the high land I would estimate at about 750 to 800 acres, or something like that.

Q. Would 900 acres about represent the acreage of the dry land or high land plus this extent of that marsh or tule land?

A. That little marsh on the east, yes. That is my understanding of the Board report.

Q. But is it your understanding of the fact? That is what I want to know—I want to know the fact.

Miss Phillips: Your Honor, I think it would clarify the matter if counsel asked the witness his estimate as of today. I think the witness is testifying to the acreage in 1853. The acreage today might be very different because there has been filling in.

Mr. Olney: Q. Take the line of high tide as it was in 1850, or 1853, or along there, and then include these marsh lands lying to the east, on the Vallejo side, what, approximately, is the total acreage? A. 900 acres.

Mr. Lipman: Q. That is exclusive of Survey 35 and Survey 569? A. Yes.

Mr. Olney: That is all.

Miss Phillips: No cross-examination.

Mr. Olney: I am not certain that Mr. Cross testified as to when this father purchased that land. He tells me it was purchased in either 1895 or 1896. Mr. Cross is here and I can call him to the stand and have him testify to that. [266]

GEORGE CROSS,

Recalled for the Defendants;

Mr. Olney: Q. Mr. Cross, when was it that your father purchased the lands concerning which you have been testifying?

A. It was either 1895 or 1896, I am inclined to believe it was in 1895, in the latter part of 1895.

Mr. Olney: We rest.

Miss Phillips: There is one correction I want to make in the record, your Honor; it is not of any great importance. Exhibit T was a series of cross sections that I offered in evidence showing a plot of the different sections at different periods. In the course of it the 1906 line was shown to have been plotted according to a contour map. So was the 1917 line. In my examination I made some reference to the fact that the 1931 map had been plotted according to a contour map. Captain Carlson, I believe the record will show, said each time that that was plotted according to notes of elevations. I said I

would bring in the 1931 map. He tells me that I was mistaken on that. He is here, but I will just sum up what he says, and, if opposing counsel so desire, they can call him on it. He says he did not make an actual contour map; they ran the contours by levels, that is, by measurements, and then actually plotted them, and then used the field notes in figuring these cross section lines. In other words, they never went to the trouble of actually making a contour map. So that in my questions in referring to a contour map of 1931 I was in error. His reply shows they were made from field notes.

Mr. Lipman: In other words, he ran sections across the lines that are shown instead of making a general survey.

Miss Phillips: That is correct.

Mr. Olney: I think we should have it appear that Captain [267] Carlson testifies, or would testify exactly as Mr. Lipman has just stated it.

Miss Phillips: (Addressing Captain Carlson) Captain Carlson, have I correctly stated the substance of what occurred?

Captain Carlson: Yes.

Mr. Olney: Now I ask leave to file our Second Amendment to the Answer, your Honor, setting up the matter of the equitable defense in accordance with the proof that has been put in.

Miss Phillips: And I presume your Honor will reserve your ruling on this, as you did before.

The Court: Yes.

Mr. Palmer: And the same in regard to James Irvine, we offer an amendment along similar lines.

Mr. Lipman: The defense rests.

Miss Phillips: The plaintiff rests.

The Court: Now, there is some testimony that you and Mr. Lipman are going to stipulate to, is there?

Mr. Lipman: Yes. I am going to get a letter from Mr. Stewart stating when Mrs. Stewart bought a piece of land up there, what piece it was, and how much was paid for it. I will submit that letter to Miss Phillips and after she O.K.'s it we will hand it to the Clerk and he can mark it as an exhibit next in order.

Miss Phillips: That is a satisfactory arrangement.

The Court: And that will be subject to the objections you have heretofore made.

Miss Phillips: Yes, your Honor.

(Defendants' Exhibit 45 will be the marking of the letter when presented.) (Set forth in Vol. III, page 285 of this printed Transcript of Record)

The Court: What is your desire about submitting the case?

(After informal discussion it was agreed that the plaintiff would be allowed the month of August for filing plaintiff's brief; [268] the defendants would be allowed the month of September for filing defendants' brief; the plaintiff to reply by October 15.) [269]

Office - Supreme Court, U. S.
FILED
JAN 8 1942
CHARLES ELMORE CROPLEY

TRANSCRIPT OF RECORD

In Five Volumes

Supreme Court of the United States

October Term, 1941

No. 848

MARY W. STEWART, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

VOLUME III

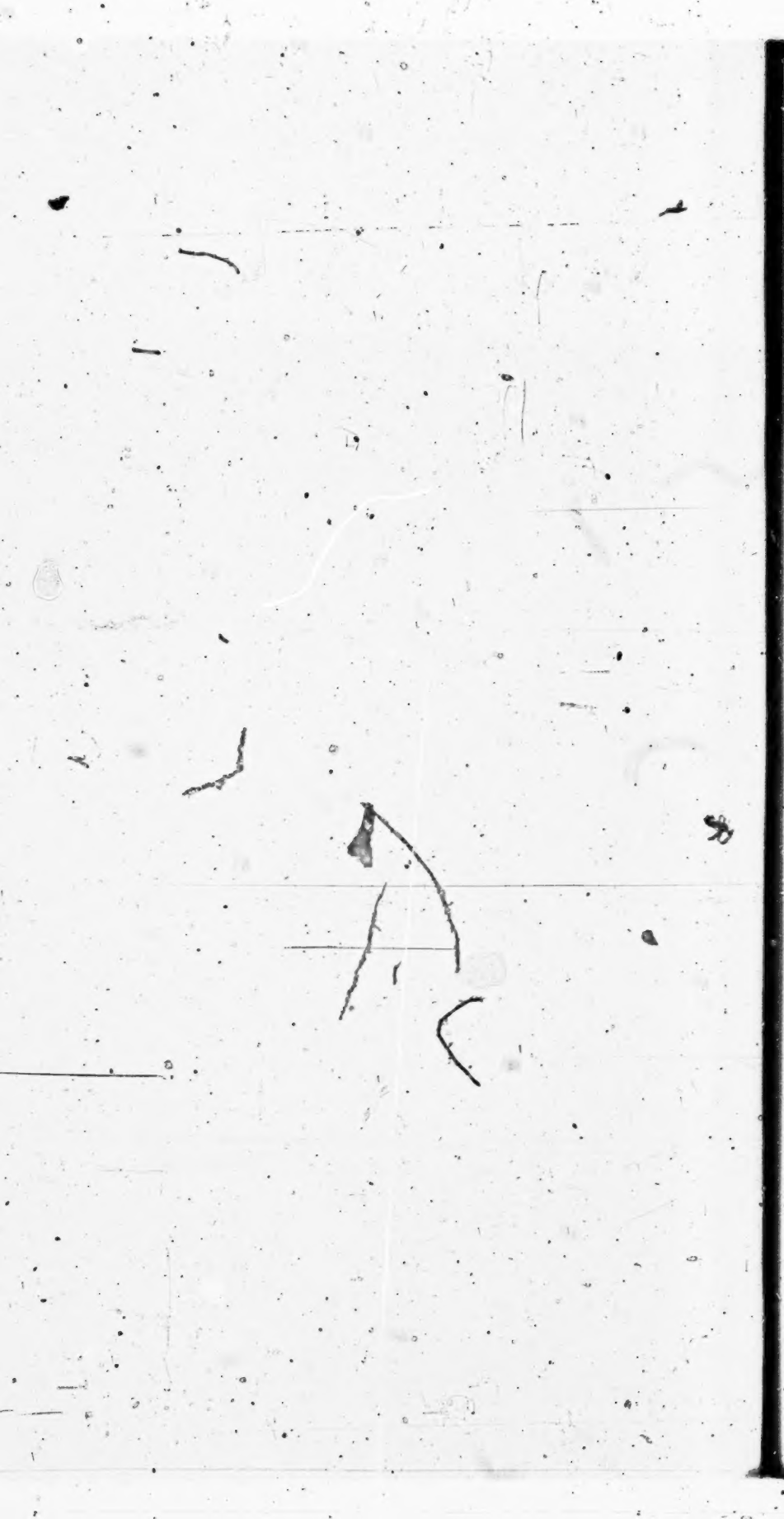
Book of Exhibits

(Pages 1 to 321)

Printed Exhibits

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 549 SANSOME STREET, SAN FRANCISCO



No. 9507

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Transcript of Record

In 4 Volumes

VOLUME III

Book of Exhibits

(Pages 1 to 321)

Printed Exhibits

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 70-8-2-40

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Portion of
U. S. EXHIBIT D-1*

No. 307

GEORGE W. BISSEL et al.,

vs.

THE UNITED STATES

DECREE OF CONFIRMATION

In this case after hearing the proofs and allegations, it is adjudged by the Commission that the claim of the said petitioners is valid, and it is therefore decreed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco, and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

R. AUG THOMPSON,
C. B. FARWELL,
Commissioners.

Filed in office, May 8, 1855.

(Signed) GEO. FISHER, Secy.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit D-1. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

*The full exhibit appears in Volume V, pages 1 to 72 inclusive of the printed Transcript of Record.

Portion of

U. S. EXHIBIT D-2*

In the United States District Court in and for the Northern District of California

No. 311

THE UNITED STATES,

Appellants.

vs.

G. W. P. BISSELL & W. H. ASPINWALL,

Appellees.

Transcript No. 307
Mare Island.

Stated Term of the Court, March 2d, 1857—
Hon. Ogden Hoffman, Judge

On appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California.

DECREE

This cause came on to be heard at a stated Term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California under the Act of Congress approved on the 3d of March A. D. 1851, rejecting the claim.

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*The full exhibit appears in Volume V, pages 73 to 139 inclusive of the printed Transcript of Record.

Upon the Transcript of the proceedings, and decision of the said Board of Commissioners, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said Transcript has been duly filed according to law and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim and that the said claim be and the same is hereby confirmed to the said "Isla de la Yegua" or "Mare Island" with its natural boundaries.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit D-2. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT E-1

To the Honble the Secretaries of the War & Navy Departments, City of Washington.

San Francisco (California) March 31, 1850.

Gentlemen:

The last communication to you from the Commission of Navy and Engineers Officers for the examination of the Coast of the U. S. on the Pacific was dated October 31, 1849, on the eve of our departure for the Sandwich Islands, with a crew furnished for our vessel by Commo. Jones which were to be transferred to the Prebble on our arrival at Honolulu.

In that communication we stated the objects of our visit to the Sandwich Islands to be the procurement of a permanent crew for the Massachusetts, which we had not been and were not likely to be able to effect in these waters, and also to have our vessel thoroughly calked and otherwise repaired which could be done there with more economy and despatch than in this neighborhood.

We left here on the 1st of November and altho we expected to be back by the middle of January we did not reach here until the 17th of this month. Our absence two months longer than had been expected was occasioned chiefly by the time we had to wait at Honolulu until the repairing of our vessel could be commenced, and the time occupied in effecting it—the workmen at the time of our arrival being unable to attend to our vessel until the repairs of

a number of whale ships that had prior claims to their services should be completed; and the repairs needed being far more extensive than had been expected.

Except the disadvantage of the loss of time just mentioned, the objects of our visit to the Sandwich Islands were successfully accomplished. We were very fortunate in shipping a sufficient crew of good men, and our vessel that was scarcely seaworthy is now in good order.

We had hoped to be able to complete our examinations here and to the south of this previously to going to Oregon but the season is now so advanced that it cannot be attempted. The chief difficulties to be encountered in the performance of our duties are supposed to be in the Columbia river and it is therefore our desire to be there, or in its neighborhood, in readiness to take advantage of a favorable time for the examination.

But the most important of our duties relate unquestionably to those waters and we therefore deemed it of paramount importance that our examinations here should be made to the extent necessary to enable us to report our opinion without delay, respecting the minute surveys, levelling, and soundings required to be made to afford the detailed information upon which works of defense and a site for a naval depot would be decided on.

On this account and also to be in the way of receiving any instructions that might during our long absence have reached here for us, we determined, on leaving the Islands to come directly here.

Commo. Jones not being here on our arrival we followed him to Benicia to procure his order for a transfer to our vessel of some of the Steam Engineers that arrived here in the Falmouth during our absence.

While there we received your communication of the 11 of Dec. last. We also examined Mare Island straits and the ground on each side of them.

We had heard while at Honolulu of the favorable result of soundings made there, at our request, by Lt. Commdg. McArthur of the U. S. Sch. Ewing, in company with Lt. Blunt of our Commission. A copy of the sketch of them furnished to us by Lt. Commdg. McArthur is sent herewith.

Since our return here from Benicia we have examined the land on the southern side of the entrance from the sea and also the Islands in this neighborhood. We had examined the northern side of the entrance some time ago.

The result of our examinations enables us to state the following as the surveys levellings and soundings in these waters which will be needed to afford the information desired as a guide to our decisions.

1. From a point 800 yards south of point José to the southern boundary of the Presidio, along that southern boundary to its western extremity and thence in a straight line to the Pacific, passing by the southern extremity of a pond that has its outlet into the channel between Fort point and Point Lobos. The surveys and levellings to be minute at point José and to the distance of 800 yards south of

it,—and at Fort point to the distance of 1200 yards around it inland. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

2d. From the southern boundary of Sausolito, by a line parallel to the channel of entrance, to the Pacific. The surveys and levellings to be made minute from Cavallo point westwardly along the ridge to Cavallo or Horse-Shoe Cove, across that cove to a point which is nearest to Fort point on the opposite side of the channel and along the shore to a distance of 600 yards west of point Diablo toward the entrance of the harbor and 800 yards back from the line. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

3d. Soundings from and including the entrance of the channel and through it 600 yards above Sausolito cove at the north; the southern extremity of San Francisco city at the south; a line in a westerly direction around Yerba Buena Island not nearer to it than 600 yards; a line thence to the mouth of San Pablo bay and thence to a point 600 yards north of Racoon Straits. These soundings would include all the channels leading from the sea to San Francisco and San Pablo bay.

4th. Minute survey and levelling of the whole of Mare Island and a general survey and levelling of the land on the eastern side of Mare Island Straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500

yards from the former and extending on a line nearly parallel to it to a point opposite the northern extremity of Mare Island and thence to the straits so as to join them at a point about 800 yards north of the northernmost high land on the eastern side of the straits. The soundings to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves beyond that depth throughout the whole of Mare Island straits and also the entrance to them from the straits of Karquines; also of fathom curves to the distance of two miles west of Mare Island in the bay of San Pablo.

It is our duty to specify what extent of ground may be necessary for the public use in connection with the several objects we are expected to report upon officially and we think it proper our opinion should be stated without delay that the Govt. may have due time to act upon the matter.

We therefore recommend the reservation for public use of all the land embraced by the several surveys above specified together with Yerba Buena, Alcatrazes and Angel Islands in San Francisco bay. It is possible a portion of these lands may be dispensed with but that cannot be judged of until after the surveys shall be completed. It will be easier to relinquish what may not be needed than to get back what may have been prematurely given up.

As the accompanying sketch of the soundings in Mare Island straits does not show the topography it may be proper to state that it is in many respects decidedly favorable and in no respect unfavorable

to the establishment of a naval depot on Mare Island. It may be proper also to state that vessels may reach the position from the sea without finding a less depth than 6 fathoms.

There will probably be recommended strong works near Fort point on the south side of the channel and also on the north side of the channel nearly opposite to Fort point. There would be works of chief importance for the defence of the entrance to the harbor. Batteries at point José and on Alcatrazes Island would cooperate with the exterior works and altho' as auxilliaries they may be regarded as of secondary importance the value of the latter is far greater than that of the former and nearly equal to that of the works at Fort point and opposite to it. A temporary battery on Angel Island opposite Alcatrazes would cooperate with the latter in defending the approach to the bay of San Pablo by the south channel—and a temporary battery on Racoon point opposite Angel Island would defend the channel leading thro' Racoon straits to the bay of San Pablo.

We expect to sail for Oregon in the course of a week.

Respectfully submitted on behalf of the Commission by your obedient servant,

G. L. SMITH,

Bt. Col. and Senior Member

For the Secretary of War.

[Endorsed]:

S5627—6

San Francisco, Cala. March 31, 50.

2 Letters

Col. John L. Smith, Sen. Member Comm.

Reports their return from the Sandwich Islands— & of their examination of the Bay of San Francisco.

S128. Rec May 8, '50.

Engr. office

Engr. Dept. Rec' May 21, 1850.

Recommends certain surveys and soundings to the reservation, for public use of all the land embraced by these surveys.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit E-1. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT E-2

The President of the United States exempts and reserves from sale, for public purposes, the following tracts or parcels of land in the State of California.

In the Bay of San Francisco, California:

1st. From a point 800 yards south of Point Jose to the southern boundary of the Presidio, along the southern boundary to its western extremity, and thence in a straight line to the Pacific Ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos.

2nd. From the southern boundary of Sau Solito Bay, a line parellel to the channel of entrance, to the Pacific.

3rd. Yerba Buena Island

4th. Alcatrazes Island

5th. Angel Island

On the eastern side of the Bay of San Pablo:

6th. Mare Island

7th. The land on the Eastern side of Mare Island straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the straits so as to join them at a point about 800 yards north of the

Northernmost high hills on the Eastern side of the straits.

MILLARD FILLMORE

Washington, Nov. 6, 1850.

(Marginal notes illegible.)

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit E-2. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT F-1

Navy Department, November 6th, 1852.

To the Honorable, the
Secretary of the Navy.

Sir:

The Board appointed to examine the shores and waters of the Bay of San Francisco in California, for the purpose of selecting a site for a Navy Yard and Depot, including a Naval Hospital and Marine Barracks, have performed the duty assigned them and have the honor to submit the following Report with plans:

No. 1—Plan of Rincon Point and Mission Bay with soundings.

No. 2—Ringgold's Chart No. 1, being a chart of the Bay of San Francisco.

No. 3—Ringgold's Chart No. 2, being a Chart of the Bay of San Pablo, Straits of Carquines and part of the Bay of San Francisco.

No. 4—Plan of Saucelito with soundings.

No. 5—Aspinwall Bay with soundings.

No. 6—Ringgold's Chart No. 3, being a chart of Suisun and Vallejo Bays.

No. 7—Plan of Mare Island showing the Topography of the land, and soundings through Mare Island Straits.

No. 8—Plan of part of Mare Island, showing the positions of the several proposed buildings and other improvements.

The Board left New York by the steamer of the 24th March last, and arrived at San Francisco on the 28th April following; there being no suitable vessel to San Francisco belonging to the Government, and the Naval vessels in port being unable to supply the wants of the Board, the most appropriate vessel which could be found was purchased without delay, and measures immediately adopted to effect such repairs and arrangements as were necessary for the service to be performed; and as these preparations would necessarily occupy some time, it was deemed a favorable opportunity to learn something of the resources of the country for furnishing such building materials, as would be required at the yard. Accordingly a portion of the Board made excursions into the interior, and the result of their enquiries will be found in another part of this report.

R. D. Cutts, Esqr., commanding the Schooner Baltimore, and attached to the Coast Survey, being in port, and having recently been employed in surveying some of the points which were to be examined, kindly furnished such copies of his work as were desired, and the Board are under great obligations to him, for his polite attention and the assistance derived, from the result of his labors.

The vessel having been properly fitted for the service, the examination was commenced at Rincon Point and Mission Bay, and as the sketches of these points furnished by Mr. Cutts exhibited the Topog-

raphy very clearly, the use of instruments on shore was deemed unnecessary; the Board however, made a careful personal examination of the ground, and sounded along the lines as indicated on Plan marked No. 1.—The two points being contiguous, were embraced in one examination, and the advantages and disadvantages which apply to the one, are generally applicable to the other.

In the letter of instructions from the Department the particular attention of the Board is directed to seven points of examination, the first of which is: Its security from attack by an enemy, and its facilities and economy for defence."

On this point it may be said that both Rincon Point and Mission Bay, and indeed the City of San Francisco itself are all at present exposed to the attack of an enemy, there being no fortifications capable of preventing a hostile fleet from entering the harbor and destroying the city. It is presumed however, that the entrance to this important Bay will soon be fortified, and then the only direction from which an attack could be made, would be from an enemy landing on the shore at some points south of the entrance to the harbor. It is probable that there would be great difficulty in landing a large force on the beach, but the danger most to be apprehended would be sudden attacks from small parties, who might land and by a rapid march of some five or six miles, approach the yard, fire it, and make good their retreat, without much hazard to themselves.

The plan of the City of San Francisco embraces both Rincon Point and the shores of Mission Bay, and it is presumed, that at some future day, when that portion of the city has been built upon, and valuable property accumulated in that quarter, measures will be adopted to guard against attacks from an enemy landing south of the entrance to the harbor, and when that is accomplished, Rincon Point and Mission Bay, would be protected, for an enemy could not approach them from the sea-shore without first passing through the city. At present however, the Board regards these points insecure from attack and incapable of defence, except at very heavy expense, the amount of which we are not able to estimate.

Second. "Its security from violent winds and sea, and the accommodations for safe anchorage in its adjacent waters." From Rincon Point to the south side of Mission Bay, there is good anchorage for vessels of heavy draft of water, but the whole line of shore is exposed to the southeast, from which quarter violent gales prevail during winter, heaving in a heavy sea, which breaks with great force along the shore, thereby endangering vessels at anchor and rendering it impossible for them to lay in safety alongside of wharves.

Third. "Its adaptation to the construction of a permanent stone dock, and for working a sectional dock in connection with a Basin and Railways, if a Basin and Railways be practicable in those waters."

The appearance of the shore between high and

low water marks, from Rincon Point to the north side of Mission Bay, would indicate a favorable foundation for a permanent stone dock, being of stone and hard gravel, the stone is of volcanic character and occasional strata of sand stone, neither of which would be suitable for building purposes, though the ledges would furnish a good foundation for the superstructure of a stone Dry Dock. For the working of a sectional or other floating dock, in connection with a basin and railways or otherwise, the Board regards this location as highly unfavorable; in addition to the want of protection from violent gales and heavy seas, the water near the shore is too shallow for the purpose, and the ground rising abruptly from the water to a mean elevation of about seventy feet, it would be impossible to obtain sufficient table land for the accommodation of the Basin, and Railways, without incurring an enormous expense. These remarks apply more particularly to Rincon Point; at Mission Bay there is not sufficient depth of water for the use of any kind of dock suitable for Naval purposes.

Fourth. "The facilities for procuring and the accommodation for boarding mechanics and workmen of various classes."

These sites are in the immediate vicinity, in fact within the limits of the largest city on the Bay, and therefore at present have an advantage over other places in the facilities for procuring workmen and accommodations for them. We do not, however, regard this point as of great importance for in this

country where towns and cities spring up as it were by enchantment, it is presumed that wherever the Government may decide to locate the Navy Yard, there workmen will soon concentrate and provide suitable accommodations for their comfort.

Fifth. "The facilities afforded for procuring most readily, materials, supplies and stores of all kinds."

The subject of building materials will be spoken of generally in another part of this Report. With regard to supplies and stores of all kinds, the sites in question being at a short distance from the business part of San Francisco, these articles could be delivered at them with great facility.

Sixth. "Its fitness and adaptation for the construction of piers, wharves, launching slips, and buildings ways, store houses for reception and keeping of various stores, marine barracks and hospital work shops of the different kinds required for the building and repairs of sailing and steam vessels of the Navy, and such dwellings for the officers attached to the yard as you may deem necessary."

Wharves and piers to be permanent must be constructed of stone, and the bottom furnishes a good foundation for walls, while the rock above water though unsuitable for building purposes, would supply an abundance of excellent material for filling in. This stone above high water is in a state of decomposition, and may readily be removed by a pick. Ordinary wharves and piers however would

afford no protection to vessels during the prevalence of southeasterly gales; as before stated, and as will be clearly seen on reference to plan No. 1 on which the topography and soundings are delineated, the ground is so elevated as to require an immense outlay, before it could be reduced to a proper grade for the construction and convenient use of buildings of any kind required in a Naval establishment, and in view of those considerations, the Board regards the sites under examination as unsuitable for a Navy Yard.

Seventh: "The effects of the Marine worms."

From information obtained from shipwrights and others employed along the shore, as well as from our personal observations, we are of the opinion that the existence of the marine worms and their destructive action in the harbor of San Francisco, are serious objections to that vicinity for the purposes of a great naval station.

After careful examination and much reflection on the subject, the Board cannot discover that Rincon Point and Mission Bay possess any advantages which should recommend or entitle them to serious consideration, as favorable sites for a Navy Yard; on the contrary there are many objections already enumerated, to which may be added the great danger to be apprehended from fire, by their close proximity to, and the position to leeward of the City of San Francisco, which is mainly of very combustible materials and which has already been

several times nearly destroyed by this devouring element.

Having concluded the examination of Rincon Point and Mission Bay, the Board next proceeded to explore the shores of the Bay of San Francisco, to a point nearly opposite the San Jose Mission and distant from San Francisco about twenty five miles. On the west shore there are many indentations which appear to present favorable sites, but upon sounding they were found to be too shallow for Naval purposes, none of them affording more than ten feet of water. Off Point Avisedera deep water was found near the shore as indicated on Ringgold's Chart No. 1; the land however is very high, and the same objections in regard to exposure which apply to Rincon Point, exist here. Along the whole west shore there is generally deep water near the projecting points, but opposite the Bays the three fathom line of soundings was found from one to two miles from the beach. This side of the Bay is accessible to an enemy from the sea shore; the channel though affording water for the largest ships is extremely narrow, and the prevailing winds during a large portion of the year, are adverse to the passage of vessels bound for sea. On the east side of the Bay the three fathom line was found from three to five or six miles from the shore, and within that line is an extensive shoal, as shown on the chart above referred to.

The result of this examination was such as to satisfy the Board beyond a doubt, that there is no

site on either shore of the Bay of San Francisco, south of the city, which possesses any advantages or recommendations, or where it would be practicable to construct a Navy Yard capable of supplying the wants of the service upon this extensive and important coast.

The Board then visted the Island of Yerba Buena, opposite the City of San Francisco. On the east side of this Island is a small bay exposed also to southeast gales, having from five to seven fathoms water, and good anchorage; the land is broken and elevated, being 300 to 500 feet above the sea, and there is no table ground suitable for the erection of buildings for Naval purposes. The Island possesses none of the requisites to recommend it as a proper or practicable site for a Navy Yard.

Clark's Point, or as it is called on Ringgold's Chart No. 2, Point Montgomery, is situated on the north side of San Francisco; there is deep water near the shore, and good holding ground, but the anchorage is much exposed and uncomfortable, the land is very high and precipitous, and there is nothing to recommend the location as on any account suitable for Naval purposes.

Saucelito on the north of the Golden Gate, and at the entrance to Raccoon Straits, as seen on Ringgold's Chart No. 2, is the point at which the provisions and stores of the Pacific squadron are now stored. The water in the Bay is deep, and there is good holding ground and anchorage for a large number of vessels, where they are well protected

from north, south and west winds, but are much exposed to east and southeast gales. The lands at Saucelito are much broken and very high, the amount at a moderate elevation being very inconsiderable and entirely inadequate for a Navy Yard. It may be attacked by an enemy landing on the coast, and would require a large outlay in fortifying the hills for its protection. Soundings were taken at this point, which with the topography of the country are shown on Plan No. 4. The approach to this place is at times very difficult, owing to the baffling winds caused by the broken and irregular high lands, and the rapid and varying currents through Raccoon Straits; here is a fine spring of excellent water from which all the shipping and many of the inhabitants of San Francisco obtain their supplies; it is on private property, and the water is sold at a high rate. As a watering place Saucelito may be considered valuable, but it is not regarded as possessing the requisites of a great Naval establishment.

Angel Island, east of Saucelito has deep water near its shores, but the land is so high and precipitous as to render it unavailable for useful purposes, except at Raccoon Cove, on the straits of the same name; this beautiful spot is entirely sheltered from all winds, has deep water and good anchorage, but the extent of water and available land is entirely too limited to render it worthy of particular examination for naval purposes.

There is an abundance of water throughout the whole extent of Racoon Straits, but neither shore presents any sites in the least degree favorable for a Navy Yard.

Aspinwall Bay, situated northwest of Angel Island, as seen on Ringgold's Chart No. 2, was next examined. At this place soundings were taken as indicated on plan No. 5; there is a sufficient depth of water with good holding ground and anchorage for a large number of vessels. This anchorage is exposed to the north, northeast and east winds, but otherwise sheltered. The land is generally high, with a small amount of table ground near the water; from the shore a flat extends to the deep water which could readily be filled in from the hills, and it is believed that a sufficient area could be obtained, to form an admirable site for a Navy Yard.

Being limited as to time under the estimate made by the Department, for the full completion of the work entrusted to us, and having before us the experience of a preceding Commission appointed for a like object; aided too by a topographical survey of the same by Mr. Cutts of the Coast Survey, we were induced to abandon this locality for the present, in search of one, that those two authorities seemed to concur in indicating as better adapted to our wants. With these views, under the above restriction as to time, reiterated by the Department under date of 30th April last, it seemed impossible to give detailed Hydrographical and Topographical

surveys for the working plans of both, and hence a less minute examination of this point was made, than was perhaps under all the circumstances, desirable; nevertheless the sequel will show, that we had not made a wrong estimate with regard to the site, that eventually most particularly elicited our attention.

Should the Department however, be unable to establish the title of the Government to Mare Island, or effect a satisfactory arrangement with those persons who claim to be its owners, the Board is of opinion that Aspinwall Bay is well worthy of a more thorough examination. From Aspinwall Bay through the Straits and Bay of San Pablo to the Straits of Carquines, there is a good channel way with sufficient water for the largest ships. The line of three and a half faths, except at points, is at a great distance from the shore, and where deep water approaches the shore, the land is high and in no place suitable for naval purposes; this passage will be seen on Ringgolds Chart No. 2. Through the Straits and Bay of San Pablo to the Straits of Carquines and Vallejo Bay there is deep water with a strong current; on the south side the channel approaches quite near the shore, but the lands are very high and the banks abrupt affording no space for any useful purpose; on the north side are Southampton Bay and Benecia and Navy Point.

Soundings were taken across the entrance to Southampton Bay, and along the east side towards Benecia; the water in the Bay is very shallow, in-

deed a large portion of it is bare at low tide. Opposite the east point of the entrance to this Bay, the channel approaches the shore and is very deep, but the extent is small and the anchorage exposed to the strong winds which almost invariably draw through Carquines Straits; the land is high and unfavorable and the point possesses no advantages. Near the east end of Benecia the Pacific Mail Steamship Company has established its works, and are about erecting extensive foundries and workshops. This point was examined but no place could be found adapted to the wants of the Navy; the water is shallow near the shore, there being less than three fathoms at a distance of five or six hundred feet from the shore, while the currents were rapid and irregular, causing vessels to lay very uneasily at their anchors. Along the shore there is a large extent of tule land which has been sounded sixty feet before reaching hard bottoms, while inside the tule, the land rises in high hills.

It is believed that Navy Point has been recommended as a suitable place for a Navy Yard, but the Board was unable to discover that it possesses any advantages except deep water near the shore. The anchorage is unsafe, the bottom being rocky, and the large body of water discharged from the Sacramento river and Suisun Bay, which is much contracted at this point, being at times forced with great violence into Vallejo Bay, causing vessels to drag or lose their anchors, and often exposing them to great danger of being thrown upon the rocks.

The land rises almost perpendicularly from the shore to the height of from one to two hundred feet, rendering it totally unfit for any purposes without an immense outlay for grading. The locations of the several points above alluded to, will be seen on reference to Ringgold's Chart No. 3.

The point which presents the most favorable appearance for the location of a great Naval establishment, is Mare Island, on the north of the entrance to Carquines Straits, and bounded on the east by Mare Island straits, which separates it from the City of Vallejo on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma. The surface of this Island at the south end is broken and elevated, some of the hills rising to the height of 280 feet, but at the north end it is more uniform and may be easily reduced to a convenient grade. A careful survey of this Island and Straits has been made, and the soundings and elevations of the land will be seen on plan No. 7.

In reference to the security of this point from attacks by an enemy, and its facilities and economy for defence, the Board, as directed in their letter of instructions, called upon Capt. H. W. Halleck of the Engineers, by letter of 24th June, asking his opinion upon that subject. A copy of the letter with his reply, dated July 1st, 1852 is hereto appended. Mare Island is situated at the distance of about 20 miles from San Francisco, which latter point it is presumed will at an early day be protected by heavy

fortifications on either side of the Golden Gate or entrance to the Bay. This done, the Island will be secure from attack in that direction, and at the present time it could be readily defended by field works upon the heights at the south end; the west side could only be approached by small boats, that part of the Bay of San Pablo being too shoal to admit of the passage of large craft. It has been supposed that a landing might be effected at Bodega, distant about 60 miles, and this Island approached in that direction through the valleys of Napa and Sonoma; the Board is of opinion that there would be no difficulty in defending that quarter by slight works upon the hills in the rear of Vallejo, which command Napa Straits and the Island. On this point the Board concurs with Capt. Halleck in the opinion that "Mare Island is admirably calculated for defence, not only from its position, but also from its topographical character."

A slight inspection of Ringgolds Chart No. 2 will show how admirably vessels laying in Mare Island Straits would be protected from winds and sea, and plan No. 7 shows that there is a channel way for vessels of the largest class, at high water, or at afternoon low tide; the entrance of such vessels at the morning low tide would be difficult. The holding ground is good, and there is ample space for a large naval force to anchor in safety.

The whole substratum of this Island is believed to be of sand stone, and from appearances there

is every reason to believe that building stone of excellent quality and in any required quantity may be obtained from the hills. There is no doubt of the practicability of obtaining an excellent foundation for permanent stone docks, and when the present prices for labor shall become somewhat reduced, they may be constructed at a reasonable cost. Basins and railways can be constructed here if deemed expedient, and there is sufficient depth of water for the working of a sectional dock in connection with a Basin or otherwise.

At present there are no mechanics or workmen in the vicinity of Mare Island; Vallejo, the capitol of the State is distant less than a mile, but the population is very small and it contains no workmen of the description required at a Navy Yard. Should the Government commence a system of improvement there would probably be no more difficulty in procuring mechanics and other workmen at Mare Island, than at any other point, as these men naturally locate themselves where employment is to be obtained.

If Mare Island should be selected as the location for the Navy Yard, a small steamer would be necessary, as no supplies or stores can be at present obtained in the vicinity; with such convenience they could at all times be readily procured from San Francisco, the distance being less than two hours run. The erection of public works on Mare Island would doubtless impart an impetus to the growth of

Vallejo, and in a short time all ordinary stores and supplies would be found there.

This point is well adapted for the construction of piers, wharves, launching slips, building ways, store houses and all other works appertaining to a complete and perfect Navy Yard, and it is believed that there is no site on or near the Bay of San Francisco which possesses so many of the requisite qualities.

That portion of the Island which it is proposed to occupy, lies at a moderate elevation, and the amount of necessary grading will be inconsiderable compared with that required at other points. There is deep water near the shore, the anchorage is good, and as the substratum is of rocks it will furnish good foundations for piers and other structures.

While at Mare Island straits, the Board had an opportunity of examining a wharf at Vallejo which had been built more than twelve months, also a buoy which had been about eighteen months upon Commission rock, and could find no evidence of the existence of the marine worms; from our own observations and the information derived from others, we feel confident in the belief that they do not exist in these waters. The wafer was tested on several occasions and found quite fresh.

Very careful soundings were taken throughout Mare Island Straits, the results of which will be seen on plan No. 7, from which it appears that there is an ample depth of water for ships of the largest class. The basis for tidal reductions, was a series of observations of all the high and low waters during

one lunar month. The tides exhibited so unusual a difference between the heights of successive low waters, as to make it inadmissible to take a mean of them as a plane of reference, and instead, the extreme low water observed, was taken as the plane to which all the soundings were reduced.

If the mean of all the low waters observed between 6 a. m. and noon be taken as zero, the mean of all the low waters observed between 6 p. m. and midnight, would be 3.88 feet higher, whilst the mean rise and fall of tide was only 4.75 feet and the extreme 9.10.

With so wide a difference between the heights of low waters, it is plain the best reduction was to the extreme low water observed; or 2.83 feet below the mean of all the low waters; this was adopted, and consequently at mean low water there will be actually nearly three feet greater depth of water than the plan shows. The high waters occurring also between six a. m. and noon, and those between six p. m. and midnight, exhibit also a difference, giving the latter the greatest height by one foot and four tenths.

The velocity of the current about the time of spring tides as ascertained by several days observation was three marine miles per hour, and the general set, parallel to the shore.

Near the centre of the straits there is a sand stone ledge, a portion of which is bare at low tide, and upon this ledge it would be advisable to erect

a beacon, or if deemed desirable, it could be removed. Between the ledge and the Island there is at high water a channel way for ships of the line. In making the soundings the bottom was generally found to be a stiff clay or soft mud, rock being found in but few places, as marked on the plan. Lines of levels were taken upon the land, and the elevations will be seen on plan No. 8. Along a part of the front of the Island there is a strip of tule land upon which borings were made to ascertain the nature of the bottom. The first was made on line No. 30, plan 8, near the outer edge of the tule, and hard clay was found at the depth of 23 feet below the surface; after boring through 6½ feet of this clay, sand stone was reached at 29½ feet below the surface of the tule, which is generally 67/100ths of a foot above ordinary high water. The next boring was on line 26, same plan, near the outer edge of the tule; hard clay was found at 21½ feet and rock at 27½ feet below the surface. The third trial was made on line No. 22, and hard clay was found at 20 feet, through which the auger penetrated 8 feet, when its further progress was arrested by sand stone. The fourth boring was on line No. 18 where hard clay was met at 18 feet and the sand stone at 27 feet below the surface of the tule. These borings occupying a large extent of the tule, presenting very uniform results, it was deemed unnecessary to extend the examination further, it being evident that the tule land was a mere deposit of inconsiderable depth upon a foundation of rock.

The result of our examinations is such as to satisfy us beyond question, that Mare Island is the most eligible site for a Navy Yard within the waters of the Bay of San Francisco, or its vicinity. The surface of the land is favorable to the erection of buildings; there is ample depth of water for working of permanent stone or floating docks, and good safe anchorage with abundant space for a large number of ships of war to lie in safety. The only serious difficulty is the absence of fresh water on the Island; this deficiency may be supplied by the construction of a suitable number of cisterns to receive and retain the rain water during the rainy season, and a steam water tank would be required, to supply the vessels from the river above Benecia. Under all the circumstances we therefore recommend its adoption as the most judicious selection which can be made, and have accordingly prepared a plan for its improvement.

Mare Island contains, including the tule opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, though it is not proposed to occupy the whole of this large area for the Yard. A portion will be required for Hospital, Magazine, Barracks and Coal Depot, while the high land at the south end can be used for grazing Government stock and may be advantageously occupied by works of defence.

In view of the great and increasing importance of our commerce on the Pacific coast, and the re-

moteness from all other Naval Stations, the Board has deemed it proper to present a plan for a Navy Yard on an extensive scale, providing all the conveniences and accommodations requisite for building and equipping large fleets of steamers as well as sailing vessels, when the exigencies of the country shall require their presence in those waters.

Plan No. 8 presents the arrangements proposed; the line of wharf front is in deep water, there being generally a sufficient depth for the largest ships of the line to lie in safety; this line is in the direction of the current, and extends the whole length of the island, a distance of about two miles. In accordance with the letter of instructions we have located a site for a Basin and Railway, for the floating dock, sites for a stone Dry Dock, and two ship-houses with launching ways; work shops and timber sheds are placed conveniently near the docks and ship houses, and a wet Basin with eight additional docks is located where vessels in ordinary may be laid in safety. The foundry and workshops necessary for the construction and repair of steam engines and other machinery, with the anchor and chain cable shops are placed at the north end of the yard to leeward of all other buildings, and contiguous to the water. Store houses for provisions and other stores are located centrally and near the water; suitable dwellings for officers are proposed, as it will be difficult, if possible, for them to procure accommodations elsewhere; spaces are marked out for the Marine Barracks, Hospital and Maga-

zine; and it is believed that the arrangements generally will be found such as to afford great facilities for the execution of the public work and abundant accommodations for all the demands which may be made upon this yard, for many years to come.

As before stated, while the vessel was preparing for the surveys, the Board conformably with its letter of instructions, made an excursion into the country, for the purpose of learning something of its resources for the supply of building materials. At Sacramento City the party separated, one portion ascending the river about one hundred and twenty miles to Colusa, while the other explored the country in the direction of Marysville, Grass Valley, Auburn, and the north fork of the American river.

Along the banks of the Sacramento above the Feather river, there is a very heavy growth of oak timber; many of the trees are of immense size, and shapes admiralty adapted for ship building, but upon examination the timber was found utterly worthless for any purpose except firewood, and very inferior for that; wheelwrights and others who use oak timber, stated that the oak of the country had neither strength nor durability, and that it was not used except for firewood. About forty miles from Colusa, yellow and white pine with red wood of excellent quality was said to be found in great abundance, but its distance from water would render it impossible to get it to market at present, at a reasonable cost. In the vicinity of Amadore,

about fifty miles from Sacramento towards the interior, there is a species of bastard live oak, which is said to be strong and durable timber; the trees are all small and unsuitable for ship building. White and yellow pine are found in this neighborhood of good quality, but too distant from water courses to be available.

Within a few miles of Grass Valley, in Nevada county, pines, both white and yellow, become common and are of large size; both varieties differ in foliage and fibre from the ordinary pines of the Atlantic coast. One variety will yield abundantly pitch, tar and turpentine, from the appearance of scarified trees. Near Greenhorn creek, pines of five feet diameter as well as red wood timber were found in great abundance. For the present, this timber for naval purposes would be useless, except for tar &c it being too distant from any stream of sufficient size to transport it to a market.

In the vicinity of Auburn, near the North fork of the American river, the country abounds in excellent white and yellow pine timber, and to the foot of the Sierra Nevada range the country is covered with excellent pine, red wood and fir timber.

The North fork is a stream of ample size during the rainy season, to "run" logs, cut upon its banks, upon which, and the country adjacent, there is an abundant supply. For the present, owing to the high price of labor, the timber could not be obtained as cheaply as from Oregon, and other parts of Cali-

fornia; it is nevertheless available if a necessity for it should exist. No oak timber of any value for building purposes is to be found in this section.

The principal growth of timber immediately contiguous to the Bay of San Francisco, is the red wood, a species of cedar, soft and unfit for ship building, but an admirable material for all constructions on land, where great durability rather than strength is required; for piles, wharf timber and many other purposes it would be excellent.

Some thirty miles towards the head of the Bay there is said to be large tracts of oak of two varieties; one is an evergreen, resembling the live oak, the wood tough and of large fibre, but the trees are small and not suitable for naval purposes, except that they might furnish good knees. The other species somewhat resembles the pasture oak of the eastern states, but this timber is of little strength, and can scarcely be considered valuable for building purposes.

Although California seems to be deficient in good timber for ship building, it is believed that an abundant supply may be obtained from Oregon. Large tracts of excellent oak timber are said to be found near the head waters of the Columbia river, which can easily be rafted to navigation. There are two varieties of fir, found in great abundance on the coast; the red, which in California is usually called Oregon pine, is not considered a superior timber for any purpose, but the yellow fir is much better, being free from knots, wind shakes &c and

an excellent timber for heavy girders and joists, and would probably answer for deck plank. Besides these there is an excellent quality of spruce, very white, clear of knots and strong; the trees grow to an immense size, and will make valuable spar timber.

At Monterey and several other points on the Coast, are large tracts of a species of hard pine which yields turpentine in abundance. The Board is of the opinion that the timber resources of the country may be greatly increased by the planting of locust, chestnut and walnut, and any other ship timbers which will grow in this climate. The country generally, it is believed, is favorable to the growth of chestnut and locust, and much Government domain might be advantageously appropriated to this purpose.

The Board would also recommend to the Department, the speedy introduction of hemp into California, as the indigenous hemp of the country, is of good, fine, long fibre, and very strong.

This country abounds in sand stone, which is found in many places, of excellent quality; in the vicinity of Benecia a quarry has been opened which yields a very fair stone, and one on the west side of the entrance to Southampton Bay is now worked, which furnishes stone of excellent quality, which is used extensively in San Francisco. This quarry is in the hands of a company who contemplate erecting steam works and machinery for cutting and dress-

ing the stone. On Mare Island there is a abundance of sand stone, probably as good as any in the vicinity. A very hard sand stone is found in great quantity at Angel Island, also at Yerba Buena, which is now much used in San Francisco for foundation walls to heavy buildings.

Lime stone of excellent quality and in immense quantities, is found at Monte Diablo and at Santa Cruz. The stone from Monte Diablo produces a fine specimen of lime which is now extensively used in San Francisco and highly approved. Near Santa Cruz a very good marble is found in abundance, which will probably in a short time be introduced as a building material. Clay for making bricks, is abundant, and the brick yards at Benecia and other points in the vicinity, furnish bricks in great quantities of good quality for rough work.

As soon as the Board became satisfied of the superiority of Mare Island for a Naval Station, application was made to the District Attorney to ascertain in whom the title to the Island was vested; this investigation occupied some time, and it was only as the Board was on the eve of leaving California, that the papers relating to the title were received. In the meantime having learned that the Island was claimed as the property of Capt. G. W. P. Bissell, W. H. Aspinwall, and the heirs of the late Lieut. MacArthur, letters were addressed to Capt. Bissell and Doctor Bowie as the representative of Lieut. MacArthur's heirs, asking the terms upon which the property could be purchased. These

letters together with their answers, and other correspondence which ensued, as well as copies of the deeds, conveyances, etc. accompany this Report and are marked from A to N.

In the examination of these last, great doubts have arisen as to the legality of the original provisional grant made by Governor Jimeno to Victor Castro in 1840, and the fee simple granted by Governor Alverado, to the same, May 20th, 1841 and upon which are founded the rights of the present claimants. This deed sets forth that by authority vested in him (Alverado) he secures this Island to Castro and his heirs. It does not appear that any consideration monies have been paid for the same or consideration further demanded, than compliance with some formulae of law of which we know nothing.

The right of the Governor to make a conveyance in any form, is not apparent to us; on the contrary, we are informed by gentlemen of the law, and other residents of California, presumed to be cognizant of the fact, that the central Mexican Government under a law inherited from its Spanish ancestry, reserved to its own use all headlands and islands in navigable waters for the purposes of defence &c. The facts in both cases, to wit: As to the right of Governor Alverado to convey public domain by fee simple, and the existence or non-existence of the law above referred to, it is presumed might best be ascertained by reference to the public archives of the Mexican Government.

The Board does not presume after the legal investigation had by its orders in California, to offer any opinion against such authority, that may have any great weight; still as these suggestions have been so frequently and so pointedly put before us, we cannot but deem it our duty to state, that we view with great caution, the legality of this chain of titles, and recommend, before any consummation of a purchase that a strict examination of the same be instituted.

It is proper to state, that in addition to the claimants above alluded to, there are several squatters already on the Island and holding possession. These persons stated, if the Government should claim the title to the Island, they would at once retire, but declared their determination to defend their titles against the claims of any individuals.

In concluding this Report, the Board cannot refrain from an expression of approbation of the prompt and efficient manner in which the duties assigned to Lieut. Ammen and Act. Master Jackson have been performed by those officers.

All of which is respectfully submitted by your obedient servants.

John D. Sloat
Wm. S. Ogden, U. S. N.
Commissioner
Simon Mason Blunt, Lt. U. S. N.
W. P. S. Sanger, Civil Engineer

Washington City, D. C.
Nov. 6th, 1852.

U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters, request that you will, as soon as possible, examine and inform them in whom is vested the true title to Mare Island.

The instructions from the Department to the Board are such as to require that your action should be as early as possible.

You will regard this communication as confidential.

Very respectfully,
J. D. Sloat
Senior Officer of the Board

To
Calhoun Benham Esq.
U. S. District Attorney,
San Francisco, Cal.

U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters have been instructed to call upon you in relation to the military defence of such places as may otherwise be deemed favorable by them.

They request that you will give them your counsel in writing upon the capabilities, and the best

plan of defence of Mare Island, as soon as may be practicable.

Very respectfully
J. D. Sloat
Senior officer of the Board

To
H. Wager Halleck
Capt. U. S. Engineers.

San Francisco, California
July 1st, 1852

Com. J. D. Sloat
Senior officer of the Board &c &c

Sir:

Your communication of June 24th asking "my opinion" upon the capabilities, and the best plan of "defence, of Mare Island" has been duly received.

In reply I would most respectfully state, that in my opinion all military works erected for the defence of the Bay of San Francisco, should be located exterior to Mare Island and that any Barracks, Depots &c erected on that Island will be entirely within the line of fortifications and consequently perfectly secure from attack by a maritime force.

With respect to "the best plan of defence of the Island" itself, I can give no details of such "plan" without a more critical examination of the topography of the Island and of the soundings in its

vicinity. I suppose however, that, at the present time, you only wish an opinion in general terms; and, from an acquaintance of many years with all the grounds in that vicinity, I feel prepared to say with much confidence, that Mare Island is admirably calculated for military defence, not only from its position, but also from its topographical character.

Very respectfully
Your obt servt
H. W. Halleck
Bvt. Capt. U. S. Engineers.

U. S. Brig Major Eastland
San Francisco Bay July 23rd 1852

Sir:

The Board of Officers for locating a Naval Depot, having ascertained that the greater number of shares of Mare Island are vested in you, and being authorized to make a conditional purchase, subject to the satisfaction of the Secretary of the Navy, ask you to give them in writing the conditions under which you are willing to sell your interest to the United States.

Very respectfully
J. D. Sloat
Senior Officer

G. W. P. Bissell Esq.
San Francisco, Cal.

A letter of like purport was also addressed to Dr. A. J. Bowie, representative of a supposed ownership of some shares.

San Francisco July 24 1852

Sir:

In answer to your letter dated the 23rd instant, I beg to say that I will sell my interest in "Mare Island" subject to the condition named, at the following rate, viz—$250 Two hundred & fifty dollars per acre, for that portion of the "Island" lying south of the main body of the tule or low ground and $50 Fifty dollars per acre for that portion lying north of the high or dry land, the first supposed to contain about nine hundred acres and the last about thirteen hundred acres.

Should you require the use of the "Island" before you can communicate with the Secretary of the Navy, a rent of $2000, two thousand dollars per month will be charged, with the proviso, that if the sale is approved of within three months from the date of the contract there will be no charge for rent.

Immediate possession of the whole Island can be given, referring to the enclosed letter from Doctor Bowie relating to the interest he represents.

I am respectfully
Your obt Servt
G. W. P. Bissell

To Comn
John D. Sloat
Sen officer of the Board for
locating a Naval Depot
San Francisco.

San Francisco, July 24th, 1852.

Sir:

In reply to your letter asking the conditions upon which I am willing to sell the interest I represent in Mare Island, I have to state that the terms offered in the accompanying note from Mr. Bissell viz. two hundred and fifty dollars per acre, for the upland and fifty dollars for the tule will be accepted by me, subject however to ratification by Mrs. McArthur, as my power of attorney (although intended so) does not in the opinion of Chitwood & Co. confer fully the right to convey real estate.

I am very Respectfully etc.,

A. J. Bowie.

Com. Jno. D. Sloat, U. S. N.,
Senior officer of the Board.

U. S. Brig Major Eastland,
San Francisco, July 26th, 1852.

Sir:

The Commission appointed by the Honble Secretary of the Navy for the purpose of selecting a site for a Navy Yard in these waters, has received your letter of the 24th inst. in reply to one of the 22nd of the same month in which you are requested to state the terms on which you would sell to the Government your interest in the locality known as "Mare Island."

The Commission takes leave to inform you that your proposition will be laid before the Honble Sec-

retary of the Navy for his action, and regret to be obliged to add that its sense of duty will compel it in view of the vast disparity in prices asked, between this Island and other adjacent lands, and in view too of the estimate of its value as very recently held by its late proprietors, together with other considerations which need not be mentioned to recommend that the interests of the United States would not be served by becoming its purchaser.

Respectfully,

J. D. Sloat,

Senior officer of the Board.

To G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 26th, 1852.

Gentlemen:

I have just had the honor to receive your communication in reply to my proposition to sell to the United States "Mare Island" for a Naval Depot under date of the 24th inst. In entering upon a negotiation with the Commissioners at their request, I did not intend to preclude them (if my proposition should not be accepted) from making on their part such an one as they should deem it for the best interests of the Government to approve of, nor to have them consider the offer on my part as an ultimatum, and I now respectfully invite the Commissioners to name the sum that would be in accord-

ance with their views, or to state if any other proposition from me will be entertained.

Respectfully,
Your obt servt,
G. W. P. Bissell.

Com. J. D. Sloat and officers forming the Board for selecting a Naval Depot, &c., &c.

U. S. Brig Major Eastland,
San Francisco, July 27th, 1852.

Sir:

In answer to your communication of yesterday's date, the Commission have to state, that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication, other than an invitation to the proprietors to present their terms of sale. If you deem it advisable to make any further proposals as an ultimatum the Commission will give it its respectful consideration.

Respectfully,
Your obt servt
John D. Sloat,
Senior officer of Board

To
G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 27th, 1852.

Gentlemen:

I have the honor to acknowledge the receipt of your letter of this date, in reply to my communication of yesterday inviting the board to propose such terms as they should deem fit for the purchase of "Mare Island."

The Commission states "that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication other than an invitation to the proprietors to present their terms of sale," being desirous that the government should not be disappointed in the possession of a place the Commission may deem most suitable to their purposes, and having reconsidered the matter and consulted with Doc Bowie who is interested in the Island, I now propose to sell our interest at the rate of $160,000 one hundred and sixty thousand dollars for the whole Island. Should the Board accept this proposition and close the contract here (subject to the approval of the Government within three months) immediate possession will be given and no charge for rent. Should however the board deem it not advisable to close the matter on these terms, I will empower Mr. W. H. Aspinwall of New York to negotiate with the Hon. Secretary of the Navy, and to arrange in Washington the whole matter on

such terms as they shall mutually agree upon there.

I remain

Respectfully,

Your obt servtv,

G. W. P. Bissell.

To Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

U. S. Brig Major Eastland,
San Francisco, July 28, 1852.

Sir:

Your letter of the 27th inst has been received and the Board feeling that the terms you there propose are much higher than should be asked for the property in question, will not enter into any purchase but prefer laying the matter and your propositions before the Navy Department, with the same recommendation as is contained in their letter to you of the 26th inst.

Respectfully,

Your obt servt

J. D. Sloat,

Senior officer of the Board.

To

G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 29th, 1852.

Gentlemen:

I duly received your letter of yesterday wherein you say that you decline the purchase of "Mare

Island" here, but will lay the whole matter before the Navy Department.

On looking over my letter to you of the 27th inst. I notice that I was not sufficiently explicit in that part of it where I speak of charging no rent. My meaning was, to offer the "Island" to the Government free of charge and without regard to future negotiations for its purchase, for such reasonable time as they may require it.

Very respectfully,
Your obt servt,
G. W. P. Bissell.

Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

Navy Department
December 10th 1852

Sir,

I have received Mr. William H. Aspinwalls letter of the 4th inst. and yours of the 7th.

Mr. Aspinwall being as you inform me fully authorized to act in behalf of all the owners of Mare Island in California, for the sale of that property to the United States and to make an absolute engagement and Contract for the Sale thereof in their name, which shall be binding upon all parties having any interest in this property. I take this occasion to say to you that I am now ready in pursuance of the authority given to me

by the 3d Section of the Act of Congress of August 31st, 1852 entitled an Act making appropriations for the Naval Service for the year ending the 30th. of June 1853. CIX of the Statutes at large 1st Sess: 32 Con: to conclude a contract for the purchase of Mare Island as recently surveyed and reported by a Board of Officers sent to California for the purpose of selecting a site for a Navy Yard, which Board have returned and made their report to the Department.

I understand the bases of the contract proposed by Mr. Aspinwall and by yourself with his authority to be as follows. That Mr. Aspinwall acting for himself and all other parties interested in the ownership of Mare Island or claiming any interest in the same proposes in their behalf and binds them and himself to convey to the United States by a good and sufficient deed or deeds the entire and absolute fee simple estate in that tract of land known as Mare Island in California including all the tide or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, giving a quit claim and full transfer of all the interest of the proprietors, in the same and all privileges, rights or claims to the waters, harbors and creeks supposed or claimed to belong to the said tract known as Mare Island.

That this conveyance is to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall

as a full consideration for the purchase whatever portion of the appropriation of one hundred thousand dollars appropriated by the act of Congress herein above referred to, may remain as the unexpended balance of that appropriation, after all the expenses of the Commission for the selection of the site for the Navy Yard and the performance of the duties assigned to the Board of Officers charged with that selection shall have been fully paid.

That this sum shall be ascertained as soon as practicable by auditing the accounts of expenses of the Commission and deducting the amount at which they may be stated from the whole amount of the appropriation and upon receiving the proper deed or deeds for a full and perfect conveyance of the title to the tract of land above mentioned, with all its appurtenances and privileges made and executed to the satisfaction of this Department, then the amount ascertained as above to be paid to the said Wm. H. Aspinwall.

It is further proposed as a part of this agreement on behalf of the owners that the United States shall permit a ferry to be established with the shore on the opposite side of the Straits of Carquenas, with a suitable reservation of five hundred feet square on Mare Island for a landing, which proposition is modified at my instance to be received as follows:

That the United States shall agree to allow a convenient ferry for intercourse with the opposite

shore with such reservation of land for a landing place on Mare Island as the government may find convenient, but this ferry always to be so far under the control of the government as to compel its removal to any part of the public property, which may be designated by the Navy Department for the convenience or advantage of the government whenever or as often as it may become necessary with reference to the security or advantage of the public interest in the operations which may be conducted on Mare Island, and also if need be, to forbid any communication between the tract called Mare Island and the opposite, but upon such conditions as the government may think it necessary to prescribe, this control being deemed necessary to be reserved to the government with a view to the good order and police regulations of the Navy Yard which it is the desire of the government to establish at this place. It being also understood that no building of any kind shall be erected on Mare Island upon the landing place of any ferry which may be permitted without the consent of the Navy Department and that any building or structure which may be erected with such consent shall be subject to removal at any time by the order or authority of the Navy Department.

I am willing to accept the proposition of Mr. Aspinwall as above stated with the modifications herein made as soon as he shall apprise me of his consent to the sale on these terms, which he may

do, by appending that consent in a note to this letter and returning the same to me.

I am respectfully,
Your obed't Srv't,
JOHN P. KENNEDY

Wm. H. Davidge,
Agent of Wm. H. Aspinwall,
New York.

I assent fully and unconditionally to the foregoing on behalf of the several owners of Mare Island.

WM. H. ASPINWALL

New York, Dec. 15, 1852.

The above copy reaffirmed by me as agent of Wm. H. Aspinwall this 1st March, 1853.

WM. H. DAVIDGE

Navy Department,
Dec. 13th, 1852.

Gentlemen:

You will oblige me by stating your opinion as to the value of the tract lately surveyed by you in California for a site for a Navy Yard, known as Mare Island.

I desire to have your estimate of its value with all its appendages and advantages regarding depth of waters, harbors, etc.

Your opinion may be formed without reference to the question of title, of which I could not expect

you to express an official judgment; my object being to obtain some guide in the estimate of its value for land and water, with a view to a contract of purchase.

Very respectfully,
Your ob't serv't,
JOHN P. KENNEDY

Com'e Jno. D. Sloat,
Com'r W. S. Ogden,
Lieut. I. F. Blunt,
W. S. Sanger, Engineer.

Washington, D. C.,
December 13, 1852.

Hon. John P. Kennedy,
Secretary of the Navy,

Sir:

I answer to your letter of this date, asking "your (our) opinion as to the value of the tract lately surveyed by you (us) in California for a site for a Navy Yard, known as Mare Island, and desiring to have your (our) estimate of its value, with all its appendages and advantages, regarding depth of water, harbor, etc., and stating that your (our) opinion may be formed without reference to the question of title, of which I (you) could not expect you (us) to express an official judgment, my (your) object being to obtain some guide in the estimate of its value for land and water with a view to a contract of purchase." We have the honor to state

the Island, including the tule opposite Vallejo, contains about nine hundred acres in addition to a large tract of tule extending toward Napa and Sonoma. There is ample space for all the buildings required for a Navy Yard, with good anchorage for ships of war, and, as stated in our report of the 6th ult., we consider it the most elligible location near San Francisco. In reference to the value of this site, for the purposes of a naval establishment, combining as it does, all the advantages stated in our report, with respect to the depth of water, and general commodiousness as a harbor. We are of the opinion, tho' we are aware that a large portion of it, say nearly three-fourths, was recently purchased for a much less sum, that it would not, perhaps, be overestimated, for the contemplated uses of the United States, at one hundred thousand dollars.

Very respectfully,
Your ob't Serv'ts,
(signed) JOHN D. SLOAT,
WM. S. OGDEN,
Comd'g U.S.N.,
SIMON FRASER BLUNT,
Lt. U.S.N.,
W. P. S. SANGER,
Civil Engineer.

State of California
County of Solano—ss.

The foregoing instruments of writing were received by me, for record, April 18, 1853 at nine o'clock A. M.

JOS. P. VAUGHN,
County Recorder.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit F-1. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT G

Navy Department

February 9th, 1853.

Sir:

By the 3rd Section of the Act of last session, Chapter CIX Statutes at large, making appropriations for the Naval Service, the Secretary of the Navy is "authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of Public Lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be found to exist in the United States or not, it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress above referred to authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your Obt. Servt.,

John P. Kennedy.

To the President.

Received and Posted in Vol. 55, p. 34. Nov. 24, 1923. A. E. "O."

Washington, February 11, 1853.

The Reservations above recommended are hereby made and the Secretary of the Navy will communi-

cate that fact to the appropriate Department, that the Reservation may be properly and legally recorded.

Millard Fillmore.

Recorded in the California Letter book, 16 Feby, 1853.

JMM 254852-1a

Navy Department

February 12th, 1853.

Sir:

I have the honor to enclose herewith a letter addressed to the President from this Department under date of the 9th inst. asking him to give the necessary orders and to direct that the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved for public uses; And the President having made the reservation and instructed me to "communicate that fact to the appropriate Department, that the reservation may be properly and legally recorded" as will appear by his order of the 11th instant added by him to the letter from this Department herein before mentioned I respectfully request that the necessary order and notice may be given to ef-

fect the reservation of the said tract of land, known as Mare Island, in the Bay of San Francisco in California, and that this Department may be advised when the necessary forms shall be completed.

I have the honor to be

Very Respectfully,

Your Obt. St.,

John P. Kennedy.

Hon. A. H. H. Stewart,

Secretary of the Interior.

Navy Dept.

Feby. 12, 1853

*See the other side.

Sec'y of the Navy

Enclo: A letter addressed to president. Rel: To the selection of a site in the Bay of San Francisco or neighboring waters for a Navy Yard, Naval Depot, etc.

See letter of instruction to the Surveyor General of California, Feb. 16th, 1853.

These letters, with the order of the President, are recorded in the California Letter Book. Respectfully referred to the Comm'r of the General Land Office, who is requested, when the necessary action is had by his office, to communicate the same for the information of the Secretary of the Navy. See letter to the Secretary of the Navy 16th Feb'y 1853.

G. C. W.

R. X.

W. MOORE

Feb. 4, '53
Dept. of Int.
Feb. 14, '53

*G. L. O. 160 acres on this island, claimed by pre emption, under Act 3d March '53, by Larned B. Harkness. See letter C-31597 and letter to Rich. M. Young, 1st July, 1853.

N. R. C.*

General Land Office
February 16th, 1853

Samuel D. King, Esq.
Surveyor General,
San Francisco, California

Sir:

Herewith are transmitted copies of two communications, one from the Hon'ble Secretary of the Navy dated 9th inst. in reference to the proposed reservation under the provisions of "The 3rd Section of the act of last session, Chap. CIX, statutes at large, making appropriation for the naval service," whereby "the Secretary of the Navy is authorized and directed to select a site for a navy yard and naval depot in the Bay of San Francisco, in California, or neighboring waters, either by purchase or reservation of public lands,"—in pursuance whereof the Secretary of the Navy recommends that the President "give the necessary orders to that end and direct that the tract of land in the bay of San Francisco bounded by the Bay

of San Pablo, the Straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of same, be reserved to the United States for public uses"; —whereupon the President has directed as follows:

"Washington, February 11th, 1853

"The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department that the reservation may be properly and legally recorded"

(signed) "Millard Fillmore"

The other communication, herewith transmitted, is a copy of a letter from the Hon. Secretary of the Navy to the Hon. Secretary of the Interior, dated 12th inst., both of which have been referred by the latter to this office for the necessary action to be taken thereon.

The island alluded to will be found enumerated amongst the reservations for public use made by the President, and communicated in the letter from this office to you on 24th June, 1851.

You will please to record these orders of reservation and advise this office of your having so done. They are recorded in the office, in the California Letter Book under the date hereof.

The sheet of Ringgold's charts showing the position of the island alluded to, which was transmitted to this office with the communication referred to, is herewith transmitted. I hope shortly to be enabled to furnish you with a number of sets of the charts published by that officer.

Very respectfully, Your obed't Serv't,
JOHN WILSON Commissioner

Surveyor General's Office
San Francisco, Cal.
March 31, 1853

Sir:

I have the honour to acknowledge the receipt of the following communications to wit:

Yours of the 14th Feb. in relation to remittances previously made, and notifying us of the shipping of blank field note books and manuals of instruction to deputy surveyors.

Also, of the 16th ult. enclosing two communications from the Hon. Secretary of the Navy, relating to reservations; which, as you desired, have been duly recorded. [(Marginal notation): Naval reserve of Mare Island.]

Also, of the 19th ult., in answer to Mr. King, relative to surveys of private land claims, marked (A.) (B.).

Very respectfully, Your ob't Serv't,
LEANDER RANSOM,
Act'g Sur. Genl. Cala.

Hon. Jno. Wilson
Comr. Genl. Land Office
Washington, D. C.

Acting Sur. Genl., of California
March 31, '53

Acknowledges the receipt of sundry communications from the Com.

Naval—Mare Island confirmed to Bissel and Aspinwall by Dist. Court Mch. 2, 1857.

Acknowledgment noted in record.

Advised Secretary of the Navy, April 30th, 1853, that the order for surveying "Mare" Island in San Francisco Bay for naval purposes had been received and recorded at San Francisco in the Sur. Genl. Office.

See previous letter to the Secretary of Navy, 16th Feby. 1853.

J. TRINE, Clk. of Surveys
29 Apr. 1853

(Marginal notations illegible)

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit G. Filed June 8, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT H

MARE ISLAND CONTRACT BETWEEN THE UNITED STATES AND W. H. ASPINWALL.

Filed for record April 18th, 1853, at 9 o'clock a. m. and recorded in book H, pages 7, 8 & 9 of the records of Solano County, California. Jas. P. Vaughn, County Recorder.

Navy Department
December 10th, 1852.

Sir:

I have received Mr. William H. Aspinwalls letter of the 4th inst and yours of the 7th. Mr. Aspinwall being as you inform me fully authorized to act in behalf of all the owners of Mare Island in California, for the sale of that property to the Unifed States and to make an absolute engagement & contract for the sale thereof in their names, which shall be binding upon all parties having any interest in this property, I take this occasion to say to you that I am now ready in pursuance of the authority given to me by the 3rd Section of the Act of Congress of August 31st, 1852, entitled an act making appropriations for the Naval Service for the year ending the 30th of June 1853, CIX of the United States at large, 1st Sess. 32 Con; to conclude a contract for the purchase of Mare Island as recently surveyed & reported by a Board of Of-

ficers sent to California for the purpose of selecting a site for a Navy Yard, which Board have returned and made their report to this Department. I understand the basis of a contract proposed by Mr. Aspinwall & by yourself with his authority to be as follows: That Mr. Aspinwall acting for himself and all other parties interested in the ownership of Mare Island or claiming any interest in the same, proposes in their behalf & binds them and himself to convey to the United States by a good and sufficient deed or deeds, the entire and absolute fee simple estate in that tract of land known as Mare Island in California including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same giving a quitclaim and full transfer of all the interest of the proprietors in the same and all privileges, rights or claims to the waters, harbors, and creeks supposed or claimed to belong to the said tract known as Mare Island.

That this conveyance is to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall as a full consideration for the purchase, whatever, portion of the appropriation of One Hundred Thousand Dollars appropriated by the Act of Congress herein above referred to may remain as the unexpended balance of that appropriation, after all the expenses of the Commission for the selection of the site for the Navy Yard and the performance of the duties assigned to the Board of Officers charged

with the selection shall have been fully paid. That this sum shall be ascertained as soon as practicable by auditing the accounts of expenses of the Commission and deducting the amount at which they may be stated from the whole amount of the appropriation and upon receiving the proper deed or deeds for a full & perfect conveyance of the title to the tract of land above mentioned, with all its appurtenances and privileges made and executed to the satisfaction of the Department, then the amount ascertained as above to be paid to the said Wm. H. Aspinwall.

It is further proposed as a part of this agreement on behalf of the owners that the United States shall permit a ferry to be established with the shore on the opposite side of the Straits of Carquinez, with a suitable reservation of five hundred feet square on Mare Island for a landing which proposition is modified at my instance to be received as follows:

That the United States shall agree to allow a convenient ferry for intercourse with the opposite shore with such reservation of land for a landing place on Mare Island as the Government may find convenient, but the ferry always to be so far under the control of the Government as to compel its removal to any part of the public property which may be designated by the Navy Department for the convenience or advantage of the Government whenever or as often as it may become necessary with reference to the security or advantage of the public

interest in the operation which may be conducted on Mare Island, and also if need be to forbid any communication between the tract called Mare Island and the opposite, but upon such conditions as the Government may think it necessary to prescribe, this control being deemed necessary to be reserved to the Government with a view to the good order and police regulations of the Navy Yard which it is the design of the Government to establish at this place. It being also understood that no building of any kind shall be erected on Mare Island upon the landing place of any ferry which may be permitted, without the consent of the Navy Department and that any building or structure which may be erected with such consent shall be subject to removal at any time by the order or authority of the Navy Department.

I am willing to accept the proposition of Mr. Aspinwall as above stated with the modifications herein made, as soon as he shall apprise me of his consent to the sale on these terms which he may do by appending that consent in a note to this letter & returning the same to me.

I am Respectfully Your Obdt Servant

John P. Kennedy.

Wm. H. Davidge, Esq., Agent of Wm. H. Aspinwall Esq., New York.

I assent fully & unconditionally to the foregoing on behalf of the several owners of Mare Island.

Wm. H. Aspinwall.

New York, Dec. 15th 1852.

DEED FROM GEO. W. P. BISSELL, BY HIS ATTORNEY, WM. H. ASPINWALL, WM. H. ASPINWALL AND MARY S. McARTHUR, TO THE UNITED STATES, CONVEYING MARE ISLAND IN CALIFORNIA.

Filed for Record April 18th, 1853 at 9 o'clock A. M., and Recorded in Book H, Pages 10, 11, 12 & 13 of the Records of Solano County, California. Jos. P. Vaughn, County Recorder. $11.50 Paid.

TO ALL WHOM THESE PRESENTS SHALL COME: George W. P. Bissell of the City of San Francisco, in California, William H. Aspinwall of the City of New York, in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland send Greeting.

Whereas the said parties as tenants in common are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a Navy Yard and for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interests and proportions of the said owners respectively in the said Island are as follows: that is to say:—Of the said George W. P. Bissell fifty eight eightieth parts and one fourth of an eightieth part (the whole being divided into equal eightieth parts) the said William H. Aspinwall, sixteen and three fourths eightieth parts, and the said Mary S. McArthur as sole devisee of William P. McAr-

thur, deceased of the remaining five eightieth parts; And they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed, paid to them severally and respectively according to their several and respective interests aforesaid, with the exception hereinafter expressed. NOW THESE PRESENTS WITNESS: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of Eighty-three thousand four hundred and ninety one dollars to them paid, in proportion to their said interests respectively, on behalf of the United States of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released and quitclaimed and by these presents do grant, bargain, sell, release and quitclaim unto the United States, all that tract of land and Island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter expressed) with the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to hold the same to the United States of America, and their assigns forever, with the mutual agreements that the said grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officer or officers at the time representing the Navy Department at San Francisco, for the landing of which Ferry on the said Island, a piece of land on the margin and shore of said Island, to be selected and located by the said Grantors their heirs and assigns with such assent and approval as last aforesaid, however ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States, That the said Ferry and landing place, shall at all times for the purpose of police, and the regulation of persons and things in the Navy Yard *by* subject to such orders as the Secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island; And also that no building of any kind shall be erected on the landing place without such consent as aforesaid; and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States

in reference to the said Public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for the purpose of such landing place, the landing of the said Ferry shall be removed to such new landing place and the Ferry privilege shall apply to such new landing place and all other terms hereof in relation thereto, and so on from time to time as changes in this respect may be found necessary on part of the United States and on every such change it shall be lawful for said grantors their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the Ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors their heirs and assigns to conform to such removal with all convenient speed. And the said grantors for themselves according to their several interests aforesaid, and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the law for the more perfect assurance unto them of the premises hereby purporting to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof, the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of Attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty three.

G. W. P. Bissell [L.S.]
By Wm. H. Aspinwall, Atty. [L.S.]
Wm. H. Aspinwall [L.S.]
Mary S. McArthur [L.S.]

Signed and Delivered in the Presence of:
As to the signatures of G. W. Bissell, W. H. Aspinwall, Atty., and William H. Aspinwall.
Wm. Macrea
J. C. Laurence.
J. D. Pratt—Jno. J. Young, as to Mary *S. Arthur.*

State of New York,
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California, to take the acknowledgments and proof of deeds and other instruments of writing under seal to be *used* or recorded in same State of California and to administer oaths and affirmations Do Hereby Certify that on the day of the date hereof before me personally came William H. Aspinwall in his individual capacity and as the Attorney in fact of

George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he has executed the same in his individual capacity and as the Attorney in fact of George W. P. Bissell one of the parties therein described by virtue of a power of Attorney duly executed by the said George W. P. Bissell for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January in the year of Our Lord one thousand eight hundred and fifty-three.

[Seal] Joseph C. Laurence,
Commissioner of the State of California
in and for the State of New York, 68
Water Street, New York.

State of Maryland,
Baltimore City & County—ss.

On this fifth day of January, A. D. 1853, before me, Jabez D. Pratt, a Commissioner appointed by the Governor of the State of California, in and for the State of Maryland, to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed and sealed the same before me acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[Seal] Jabez D. Pratt,
Comr for California.

WILLIAM H. ASPINWALL & SAMUEL W. COMSTOCK TO THE UNITED STATES. BOND

Filed for record April 18th, 1853 at 9 o'clock a. m., and recorded in Book H, pages 13, 14, 15, 16 & 17 of the records of Solano County, California. Jas. P. Vaughn, County Recorder. $20.00 paid.

KNOW ALL MEN BY THESE PRESENTS: that we William H. Aspinwall and Samuel W. Comstock of the City of New York, Merchants, are held and firmly bound unto the United States of America in the penal sum of Two Hundred Thousand Dollars lawful money of the United States, to be paid to the said United States or the Secretary of the Navy thereof, For which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

In Testimony Whereof, we have hereunto signed our names and affixed our seals in the City of New York on this twenty eighth day of February in the year Eighteen hundred and fifty three.

Whereas the said William H. Aspinwall in his own right and as Attorney of George W. P. Bissell of California, and also as Attorney for Mary S.

McArthur did on the fifteenth day of December eighteen hundred & fifty two enter into a Contract with the Hon. John P. Kennedy, Secretary of the Navy, in conformity with the terms and stipulations relating thereto, expressed in a letter of the said Secretary of the Navy dated on the tenth day of December Eighteen hundred and fifty two, which letter and the assent of the said William H. Aspinwall are on the files of the Navy Department, whereby the said William H. Aspinwall acting for himself and the other parties hereinabove referred to did covenant and agree to sell to the United States the tract of land in California, in the Bay of San Pablo, known by the name of Mare Island, and did thereby bind himself and all other parties interested in the ownership of the same to convey to the United States, by a good and sufficient deed or Deeds, the entire and absolute fee simple Estate in the said tract of land known as Mare Island aforesaid, which conveyance it was stipulated was to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall, as a full consideration for said purchase whatever portion of the appropriation of one hundred thousand dollars appropriated by Act of Congress of the 31st August 1852 should remain as the unexpended balance thereof after all the expenses of the Commission for the selection of a site for a Navy Yard in California and the performance of the duties assigned to the Board of Officers, charged with that selection should have

been fully paid. And which said Contract or agreement contains also other stipulations which the Parties thereto were to observe, all of which will more fully appear by reference thereto the same being appended to this Bond for the interpretation of the same and as a part thereof.

And Whereas the said William H. Aspinwall acting in his own right, and as attorney for the said George W. P. Bissell, has together with Mary S. McArthur executed a Deed to the United States in pursuance of the above Contract and for the conveyance of the said tract called Mare Island and its appurtenances with covenants for further assurance of the same should be necessary, which deed is dated on the fourth day of January Eighteen hundred and fifty three, and is deposited with the Secretary of the Navy.

Now the condition of the above written obligation is such that if the said William H. Aspinwall shall well and truly observe, perform and fulfil the obligations of the said Contract hereinabove referred to and more particularly set forth in the copy thereof, hereto appended and shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said William H. Aspinwall, and shall also indemnify and save harmless the United States against any adverse claim or

title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter be successfully established against the title proposed to be conveyed by said William H. Aspinwall and those with and through whom he claims to hold the same by which the full and perfect title of the United States as derived by the conveyance of the said William H. Aspinwall and the parties represented by him, may be in anywise impaired, diminished or destroyed and if the said William H. Aspinwall and those whom he represents so far as he and they are bound thereto by the covenants of the deed of conveyance herein above referred to and the contract hereinbefore recited, procure and executed such further conveyance by Deed or Deeds as may become necessary for the complete establishment and security of the title in the United States, in conformity with the true interest of said contract; And also if the said George W. P. Bissell's Power of Attorney to the said William H. Aspinwall shall have been revoked by any matter of fact or of law or if the said George W. P. Bissell shall prior to the date when the Deed herein above referred to or any substitute for the said Deed, shall be sent to California and be received there to be registered and recorded the same to be sent forward without unreasonable delay have disposed of or encumbered the said lands so that the title to the United States therein may be impaired, in which event if all such incumbrances or acts tending to impair the said title be not forth-

with removed or defeated and by reason of such failure to remove or defeat them, the Secretary of the Navy, should think fit to reconvey or relinquish the said land to the Grantors named in the deed herein above mentioned their heirs and assigns, and the said William H. Aspinwall his heirs, executors administrators or assigns in that case should refund and repay to the United States the amount which shall have been paid to him as the consideration of the said purchase with interest at the rate of six per cent on the same, then upon this and all other contingencies hereinbefore expressed this obligation shall become void but otherwise it shall stand and remain in full force and virtue according to its tenor and effect,

Wm. H. Aspinwall (L.S.)
Saml W. Comstock (L.S.)

Signed, Sealed and Delivered in presence of:
Wm. Macrea.

[Printer's Note]: Letter of Secretary of the Navy, dated Dec. 10, 1852, copy of which is attached to the foregoing Bond, is not here reproduced, as it is already set forth at pages 50-54 and 66-69 of this printed transcript of record. The following is appended to the copy of said letter as attached to the Bond: "The above reaffirmed by me as agent of Wm. H. Aspinwall this 1st March, 1853. Wm. H. Davidge."

State of California
County of San Francisco.

The last will of William P. McArthur deceased, a copy of which is hereto annexed having been proved and recorded in the Probate Court of the County of San Francisco, Augustus I. Bowie, who is named therein is hereby appointed Executor.

Witness John E. Addison, Clerk of the Probate Court of the County of San Francisco, with the seal of said Court affixed this 8th day of February, A. D. 1851. By order of the court.

J. E. Addison, Clerk
Per J. I. Papy, D. C.

COPY OF WILL.

The last will and testament of William P. McArthur of the United States Navy, late of the City of Washington, D. C. now of the City of San Francisco, State of California. I the said William P. McArthur being of sound and desposing mind and desposing mind and memory do make and publish this my last will and testament which is as follows: I give and bequeath to my wife Mary S. McArthur all and singular my real and personal estate of every name and description that may remain after the payment of my just debts and funeral expenses. And I do hereby appoint Joseph M. McArthur and Augustus I. Bowie Executors of this my last will and testament.

In testimony Whereof I have hereunto set my hand and affixed my seal, this the Nineteenth day of November in the year Eighteen hundred and fifty (Nov. 19th, 1850).

W. P. McArthur.

The above instrument consisting of one sheet was now here subscribed by William P. McArthur the testator, in the presence of each of us and was at the same time declared by him to be his last will and testament and we at his request signed our names hereto as attesting witnesses this the Nineteenth day of November A. D. 1850.

H. Ray Bowie
I. H. McDugall

I, John E. Addison, Clerk of the Probate Court of San Francisco County hereby certify the foregoing to be a true copy of the last will and testament of W. P. McArthur deed admitted to Probate and now on the records of said court.

J. E. Addison, Clk
per J. I. Papy, D. C.

POWER OF ATTORNEY FROM MARY S. McARTHUR TO WM. C. YOUNG

KNOW ALL MEN BY THESE PRESENTS: That I, Mary S. McArthur of the City of Baltimore, and State of Maryland, widow, and sole legatee under the will of Lieut. William P. McArthur,

U. S. N., have made, constituted and appointed and do by these presents make, constitute and appoint William C. Young of the City and Co. of New York and State of New York my true and lawful attorney for me and in my name, place and stead, to bargain, sell, grant, release and convey to such person or persons and for such consideration or considerations as he my said attorney shall seem most to my advantage and profit all my undivided sixteenth part of Mare Island situated in the County of *Sonoma*, and State of California, and upon such sale or sales to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this thirteenth day of December A. D. 1852.

Mary S. McArthur [L.S.]

Sealed and delivered in presence of:
Jabez D. Pratt, Jno. J. Young.

State of Maryland,
City and County of Baltimore.

Be it remembered that on this thirteenth day of December A. D. 1852 before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California, in and for the State of Maryland aforesaid to take the proof and acknowledgment of deeds etc to be used or recorded in the State of California personally appeared Mary S. McArthur personally known to me to be the person named in and described as the party grantor to the within power of attorney and having signed and sealed the same in my presence, she acknowledged that she executed the same as her voluntary act and deed for the purposes therein expressed.

Witness my hand and official seal on the day and year last aforesaid.

Jabez D. Pratt,
Com. for Cal.

POWER OF ATTORNEY—GEO. W. BISSELL TO WILLIAM H. ASPINWALL

KNOW ALL MEN BY THESE PRESENTS: That I, George W. P. Bissell of the City and County of San Francisco, State of California, have made, constituted and appointed and by these presents do make, constitute and appoint William H. Aspinwall of New York my true and lawful attorney for me and in my name, place and stead to grant, bargain, and sell, lease or otherwise dispose of all my right,

title and interest in that piece or parcel of land lying and being situate in the State of California, County of Sonoma, known as "Mare Island" or any part or parcel thereof for such sum or price and on such terms as to him shall seem meet and for me and in my name to make, executed, acknowledge and deliver good and sufficient deeds and conveyances for the same, and until the sale thereof to let and demise the said Real Estate for such sum as to him shall seem meet and upon such terms as he may deem proper to ask, demand, collect, recover and receive all sums of money which shall become due, owing and payable to me by means of such bargain and sale or lease and demise, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal the thirtieth day of July in the year one thousand eight hundred and fifty two.

G. W. P. Bissell [Seal]

Sealed and delivered in the presence of: the words "my right, title and interest in" interlined before signing.

E. Giles

State of California,
City and County of San Francisco—ss.

On this thirtieth day of July A. D. 1853, before me, Lewis W. Sloat, a Notary Public duly appointed and commissioned under the Great Seal of the State of California, authorized by law to take acknowledgments, dwelling in the City of San Francisco, County aforesaid, came Geo. W. P. Bissell, to me known to be the individual described in and who executed the within instrument and acknowledged that he executed the same for the purposes therein mentioned, of his own free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, the day and year above written.

[Seal]

L. W. Sloat,
Notary Public.

MARE ISLAND APPROPRIATION EXPENSES.

I respectfully state for the information of the Secretary of the Navy that the expenses of the Commission under Commodore Sloat for the selection of a site for a Navy Yard in California, which were properly chargeable to the appropriation of $100,000 made for that object at the last Session of Congress, so far as they have come to the knowledge of this office, amount to Eleven Thousand Five Hundred and eight dollars and twenty cents.

It is probable that all the accounts which include such expenses have been rendered.

H. O. Dayton,
4" Auditor.

4" Auds Office
December 28, 1852.

VALUATION OF MARE ISLAND

Copy Navy Department, Dec. 13th, 1852.

Gentlemen:

You will oblige me by stating your opinion as to the value of the tract lately surveyed by you in California for a site for a Navy Yard, known as Mare Island. I desire to have your estimate of its value with all its appendages and advantages regarding depth of waters, harbors etc. Your opinion may be formed without reference to the question of title which I could not expect you to express an official judgment, my object being to obtain some guide in the estimate of its value for land and water with a view to a contract of purchase.

Very Respectfully,
Your Obdt Servt.
(Signed) John P. Kennedy.

Comnd Jno. D. Sloat
Comdt W. S. Ogden
Lieut. I. F. Blunt
W. S. Sanger, Engineer.

Copy Washington, December 13th, 1852.

Hon. John P. Kennedy
Secretary of the Navy
Sir:

In answer to your letter of this date asking "your (our) opinion as to the value of the tract lately surveyed by you (us) in California for a site for a Navy Yard, known as Mare Island" and desiring to have "your (our) estimate of its value with all its appendages and advantages regarding depth of water, harbors, etc" and stating that "your (our) opinion may be formed without reference to the question of title of which I (you) could not expect you (us) to express an official judgment, my (your) object being to obtain some guide in the estimate of its value for land and water, with a view to a contract of purchase," we have the honor to state the Island including the tule opposite Vallejo contains about nine hundred acres in addition to a large tract of tule extending toward Napa and Sonoma, there is ample space for all the buildings required for a Navy Yard with good anchorage for Ships of War, and as stated in our report of the 6th ult. we consider it the most eligible location near San Francisco. In reference to the value of this site for the purposes of a Naval establishment, combining as it does all the advantages stated in our Report, with respect to the depth of water and general commodiousness as a harbor, we are of the opinion tho' we are aware that a large portion of it, say nearly three fourths was recently purchased for a much

less sum, that it would not perhaps be over-estimated for the contemplated uses of the United States at one hundred thousand dollars.

Very Respectfully,

Your Obdt Servt.

(Signed) John D. Sloat,
Wm. S. Ogden, Comn U. S. N.
Simon Fraser Blunt, Lt. U. S. N.
W. P. S. Sanger

POWER OF ATTORNEY—WM. C. YOUNG TO WM. H. ASPINWALL

KNOW ALL MEN BY THESE PRESENTS: That I, William C. Young, Attorney for Mary S. McArthur, have made, constituted and appointed and by these presents do make, constitute and appoint Wm. H. Aspinwall my true and lawful attorney for me and in my name, place and stead to grant, bargain, and sell, lease or otherwise dispose of all the right, title and interest of Mary S. McArthur in that piece or parcel of land lying and being situate in the State of California, County of Sonoma, known as Mare Island, or any part or parcel thereof for such sum or price and on such terms as to him shall seem meet, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full

power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the fifteenth day of December in the year one thousand eight hundred and fifty two.

Wm. C. Young [L.S.]

Sealed and delivered in the presence of:
Frederick Hoffman.

City and County of New York—ss.

On the fifteenth day of December 1852, before me, came Frederick Hoffman with whom I am personally acquainted, who being by me duly sworn says that he resides in the City of New York, that he knows William C. Young & knows him to be the same individual described in and who executed the within power of attorney. That he executed the same in deponents presence & deponent thereupon became the subscribing witness thereto.

L. S. Hoffman,
Com. of Deeds; 79 *Nassen* St.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit H. Filed June 8. 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT P-1

REPORT OF THE BOARD OF CIVIL ENGINEERS APPOINTED TO PREPARE A PLAN FOR THE IMPROVEMENT OF THE NAVY-YARD AT MARE ISLAND, CALIFORNIA. 1873.

Bureau of Yards and Docks,
Navy Department.

Washington, D. C., September 16, 1873.

Sir: By authority of the honorable Secretary of the Navy, a board of civil engineers has been ordered to assemble at the yard under your command, for the purpose of revising the plan of the yard.

The particular instructions to this board will be submitted to you on the arrival of the members at Mare Island, which will probably be about the 26th or 27th instant.

This board will consist of civil engineers W. P. S. Sanger, Calvin Brown, and F. A. Stratton, and the Bureau will be pleased to have you give them such advice and suggestions as your long experience and great knowledge of navy-yard matters will enable you to furnish, and also to allow them such facilities as may be necessary to enable them to perform the duty for which they have been convened.

Respectfully, your obedient servant,

C. R. P. RODGERS,
Chief of Bureau.

Rear-Admiral John Rodgers, U. S. N.,
Commanding Navy-Yard, Mare Island, Cal.

Bureau of Yards and Docks,
Navy Department.

Washington, D. C., September 17, 1873.

Sir: By authority of the Secretary of the Navy, you are hereby appointed president of a board of civil engineers, whose duty it will be to carefully examine the navy-yard at Mare Island, California, and to present this Bureau with a well-considered, economical, and coherent plan for its further development, having in view all the needs of a first-class navy-yard, and the harmonious relation of its various departments.

The board will recommend the grades to be established, the streets and roads, and tramways to be prescribed, and the division of the area of the navy-yard, among the several Bureaus of the Navy Department. In this connection it may be desirable to recommend the exchange of some of the buildings now occupied, so that the workshops and storehouses may be grouped for the greater convenience of the different departments. The board will study the water-front of the navy-yard, the character of the channel that washes it, its currents and its deposits, and will recommend the best method of securing convenient quays for vessels to be at, with deep water, and so constructed that they may be scoured by the current and the necessity for dredging may be in some degree avoided.

The enlargement of our facilities for docking, repairing and building ships will receive the most careful consideration of the board.

The board will also consider the best and most economical means of furnishing the navy-yard with an ample supply of fresh water; it will choose a site for a reservoir, and it will consider the cost and feasibility of an artesian well.

It will notify the Vallejo Water Company that it is ready to receive and discuss any project that the company may desire to offer, for supplying Mare Island with water, and that it will report to this Bureau upon such proposals.

The estimate in all that pertains to the supply of water must be carefully stated.

The board will also examine the present expensive and unsatisfactory system of lighting the navy-yard, and recommend such change as will secure greater economy.

The board will present to this Bureau with its report a map and plan like that recently made for League Island, exhibiting the depth of water, the height and character of the land, the assignment of space to the Bureaus, and the structures already existing, using the same symbols as those employed on the League Island map.

It will also present its opinion as to the expediency of substituting concrete for granite in the construction of the quay-walls, and the best means of getting a secure foundation for those walls at a moderate cost. It will also study and report a plan for making roads and paving the streets at Mare Island, suitable to the peculiar soil and weather of that locality; the system hitherto in use having proved unsatisfactory.

Estimates for the quay-walls and street-making will be submitted for the guidance of the Bureau, and such other estimates as may be required for work of more pressing need.

In carrying out these instructions you will ask the counsel and suggestions of the distinguished officer now in command at Mare Island, whose large knowledge of hydrography and navy-yard administration gives great weight to his opinions.

You are authorized to employ a draughtsman, and a writer, if you think one is necessary. An office at the navy-yard will be furnished by the commandant, to whom you will report and exhibit these instructions.

Civil Engineers F. A. Stratton and Calvin Brown have been ordered to report to you as your associates on this board.

When it shall have completed its important duties you will return with Civil Engineer Stratton to Washington.

I have the honor to be, very respectfully, your obedient servant,

C. R. P. RODGERS,
Chief of Bureau.

Chief Civil Engineer W. P. S. Sanger, U. S. N.,
Bureau of Yards and Docks, Washington, D. C.

Navy-Yard,
Mare Island, California.
November 19, 1873.

Sir: The board of civil engineers appointed by your order of the 17th of September last to ex-

amine the navy-yard at Mare Island and prepare a plan for its future improvement and development on a large scale, has the honor to report that, in obedience to your order, it assembled at said navy-yard on the 29th of September, 1873, and entered at once upon the discharge of the duties assigned to it.

Mare Island is situated near the outlet of Napa Straits, its southern end being opposite the entrance of the Straits of Carquinez, and its westerly shore washed by the waters of San Pablo Bay.

The extreme length of this island, including a large tract of tule on the northern side, and extending toward Napa and Sonoma, is about ten miles, and its average width, including tule, about three-quarters of a mile.

The area of upland is 741 acres, and of the tule lands on the east side, which will be available for yard purposes, is 135 acres.

No accurate measurement has been made of the area of the tule on the northern side, but an approximate area is 3,973 acres. Its shore at the southern end is precipitous and the land high, the highest point being about 300 feet above high tide. Along the westerly shore, which is washed by the waters of San Pablo Bay, the water is quite shallow, and will admit the approach of no vessels of any size above that of ordinary small boats.

A considerable portion of the southern end of the island is so high as to render it unsuitable for the location of work-shops or store-houses, but parts of

it will furnish good localities for reservoirs for the storage of water.

Mare Island is the only naval establishment on the whole Pacific coast, and must, in the future, supply all the wants of the Northern and Southern Pacific squadrons, as well as those of the Asiatic seas.

We are fully impressed with its importance, and of the necessity for supplying it with ample facilities of all kinds to meet the many and great demands which may be made upon it.

After an examination of the island, and the various buildings which have already been erected, and a careful study of the wants of the service at this important station, we have prepared a plan for its future improvement, which we think will provide all the various buildings, docks, and other improvements necessary to constitute a complete and perfect naval establishment of first-class size and equipment.

In the arrangement of this plan care has been taken to utilize and preserve, as far as possible, the buildings which have already been erected, and it is found that, with the exception of a small timber shed, a saw-mill, and three buildings for officers' quarters, all other store-houses, workshops, and quarters can be made to harmonize with and form a part of the general plan which we have adopted.

The buildings thus far erected are good, substantial, well-built structures, and although some of them are now used for purposes different from what we contemplate in the future, they will an-

swer equally well when transferred as we propose, and the changes of occupants will produce no inconvenience, as they will be made only as new buildings are erected.

Accompanying this report are three plans:

No. 1 is a general plan of the whole island, including the tule-lands, and showing a portion of the shore on the opposite side of the Napa Straits.

Plan A represents the island, with part of the northern tule, and shows its present condition, with all the buildings and improvements, as they now are, and also the additional buildings, docks, and other improvements which we recommend.

Plan B represents the yard as it will be when all the proposed improvements are completed.

Soon after our arrival the commandant of the yard, Rear-Admiral John Rodgers, informed us that a question had been raised as to the validity of the title held by the United States to the tract of tule on the northerly side of the island leading toward Napa and Sonoma; in fact, that certain parties actually claimed to own a portion of this tule by virtue of a title held from the State of California. This distinguished officer has expended much time and labor in the investigation of this question, and has prepared an elaborate and instructive report to the Chief of the Bureau of Yards and Docks, giving all the facts which he has been enabled to obtain, and recommending the employment of the United States district attorney to make further research.

We regard this question of title as one of very great importance to the Government, and, as it is purely a legal one, we concur with the admiral in the opinion that the law-agent of the Government is the proper person to pursue the investigation, and that the matter should be committed to his charge without delay. We would further remark that, in case the Government title should prove defective, we regard the possession of this tule as very advantageous, and recommend that immediate steps be taken to secure an undisputed title to the property. This board, however, presumes that the title is in the United States, and acted upon that presumption in preparing the plan for the future improvement of the island.

Upon comparing the chart of soundings taken by the officers of the Coast Survey in 1872 with those made by the commissioners in 1852, it appears that the deep-water lines have receded from the shore-line, while the depths in the channel are not materially changed; the chart of 1872 showing, in a few places, deeper water than that of 1852. The width of the channel is somewhat less, the water having shoaled on the Vallejo side.

We find no record of observations having been taken to ascertain the velocity of the current, but it is the opinion of several persons who have long resided here, and are familiar with the river, that the current is now considerably stronger than formerly. The changes which have occurred have doubtless been produced by local causes, and it is believed that when the shore-line of the yard shall

have been built, as proposed, the effects of the current along this straight line of wall will be to scour the front and maintain a proper depth of water.

The first step taken in preparing the plan was to establish the location of the front line of the quay-wall. The space between the line of buildings and the present front wall is only 100 feet, which is too limited for large operations. The water along that front is shallow, and the line, when extended, is not sufficiently remote from the line of tule to admit of the basins and railways which we propose, without encroaching too much upon the uplands; and, for these reasons, we have located the front line 100 feet beyond the present line. In connection with this location was the determination of a proper height for the wall and dock coping, and this was found to be a question requiring much careful study, as it was necessary to establish this height at a point which would best serve the purposes of a landing-wharf, and also afford the most numerous opportunities for docking vessels.

The present quay-wall coping is unnecessarily and inconveniently high, rendering it difficult to discharge cargoes from small or medium-sized vessels at low water. And it is too high for the coping of the dry-dock, for at that height nearly two feet of the proposed depth of water on the gate-arch would be lost, except in rare cases of extreme high tide.

The reliable tidal observations which have been made at this yard are rather limited in number, and do not extend over a long period of time. Other

observations have been made, but, unfortunately, the *plane* of reference has been lost. Some important facts, however, have been preserved, from which we have been able to ascertain the points of the highest and lowest tides known to have occurred during a long period of years. With these facts, and such data as could be obtained from the tidal record, we have established the height of the quay-wall and dry-dock coping at a point 1.81 feet below the level of the present quay-wall coping, and we believe this height will be found well adapted to both purposes. It will be a much more convenient height for unloading small vessels at any state of the tide, and will render the dry-dock available for docking vessels of the largest draught of water during the high tides, and secure a larger range for its use during the lesser tides. There is a peculiar feature in the range of tides at this place, and it is this, that there are what are called "greater high tides" and "lesser high tides," and these alternate regularly; and as the time of high water falls about 40 minutes later each day, these "greater high tides" occur sometimes during the day and sometimes during the night, and this feature somewhat complicates the question.

By reference to the accompanying plan A it will be seen from the diagram showing the range of tides that the height of the highest known tide was 2.20 feet below the point established as the height of the dock-coping, and with such a tide there would be 30.30 feet of water on the gate-sill of the dock. The lowest known low-tide was 12.03 feet below the

coping, and that at such a tide there would be 20.47 feet of water on the sill. The average height of all the "greater high tides" observed is 4.50 feet below the coping, and gives 28 feet of water on the sill. The average of all the "lesser high tides" is 5.42 feet below coping, and gives 27.08 feet of water on the sill. The average of the "greater low tides" is 9.16 feet below coping, and gives 23.34 feet of water on the sill. The average of the "lesser low tides" is 11.14 feet below coping, and gives 21.36 feet of water on the sill; and the average of all low tides is 10.10 feet below coping, and gives 22.40 feet of water on the gate-sill.

From this examination it is evident that at all times of high tide there will be at least two feet of water on the gate-sill in excess of the depth at high water on the miter-sills of the stone dry-docks at the other navy-yards; that vessels drawing 28 feet may be docked at the highest "greater high tides;" vessels drawing 27 feet at an average of all high tides; and vessels drawing 26.50 feet at an average of the "lesser high tides." It is also evident that at an average low tide a vessel drawing 22 feet of water could pass over the sill.

Having located the front line of quay-wall and established the height of coping, the next proceeding was to divide the available area of the yard among the several bureaus as nearly as possible in proportion to their respective requirements; and as this is the only naval station on this western coast, ample and liberal provision has been made for all the buildings and other improvements which

may be needed for the accommodation of the various branches of work to be executed and the large quantities of material and stores which must necessarily accumulate at this point.

The Bureau of Construction and Repair being considered as first in importance, its wants were first carefully considered, and it was apparent that the object of first necessity was to provide ample facilities for constructing, launching, and repairing ships, and for these purposes a suitable number of building-slips and dry-docks must be provided. The question of the kind of dock best adapted to the wants of the service was fully discussed, and the opinion arrived at was unanimous.

Two of the members of this board were also members of a former board of engineers appointed to prepare a plan for the development of League Island, which board fully and thoroughly investigated the subject of dry-docks, and came to the same conclusion, that the system of floating-docks in connection with basins and railways for taking vessels on and off the land, or what might properly be called the American system, is the best, and will furnish greater facilities by the expenditure of a given sum of money than any other known plan. This system is no untried experiment, it having been adopted by the Government more than twenty years ago and been in successful operation since that time at the navy-yards at Kittery, Philadelphia, Pensacola, and Mare Island. At the first-named yard many vessels have been taken on and

off the land, and among them one of our largest and heaviest ships, the Franklin, was taken on shore, repaired, and again put afloat with perfect ease and safety.

We, therefore, recommend the adoption of this system at this yard, and have arranged a basin with railways on a scale commensurate with the importance of this great western establishment.

The stone dry-dock now in course of construction, and the basin and railway already built and in use, form proper starting points for the location of works for this bureau; and we propose to occupy that portion of the eastern shore of the yard, south of these, to near the lands occupied for magazine purposes, for the accommodation of works appertaining to the Bureaus of Construction and Repair and Steam Engineering.

The present shallow basin was designed to receive but one vessel, it being only large enough for one railway, and it is proposed to extend this basin 2,385 feet south, so as to provide space for twenty-four railways. The floating dry-dock now in use is of wood, and at present is in good order, having been recently repaired; it has a lifting power of 4,000 tons, and probably, with the aid of two other sections, which need repairing, a vessel of 4,500 tons displacement might be raised with safety.

This dock will doubtless prove serviceable for several years to come, but we recommend that when it shall again require a thorough repair a new dock be built of iron. The proposed extended basin and

railways, in connection with a properly constructed floating-dock, would be capable of raising and taking on shore ships of any size which will probably ever be constructed for our navy. New ships may be built upon the railways, taken upon the floating-dock, and placed afloat without incurring the expense or risk attending the launching of large ships. The stone dry-dock now being constructed will be of ample capacity to receive vessels of the largest class, the depth of water on the gate-sill at high tide being 27.5 feet, or 2.5 feet more than any of the other stone docks in the country. This dock, as before stated, with the floating-dock, basin and railways, will furnish the necessary facilities for building and repairing twenty-six vessels of the largest class at the same time, thus placing Mare Island, in this respect, on a footing equal or superior to the largest dock-yard of Europe.

At the northern end of the yard we have located a shallow basin in connection with twelve railways for laying vessels on shore when not needed for active service. These railways will store twenty-four ships of the largest class, or a proportionally larger number of smaller size, in safe position, where they may be kept clean and always in condition to be put afloat at a few hours' notice and be ready for active service.

Should the exigencies of war require greater docking facilities, these railways last described, although not very convenient to the workshops and

other buildings, might be used for building or repairing purposes.

Immediately south of and adjoining the large shallow basin and railways for building and repairing is a deep basin where large vessels may lie afloat at all times of tide, either when fitting or completing, or when laid up in ordinary, or when undergoing repairs which do not render docking necessary. This basin is 3,318 feet in length, 1,038 feet of which is 449 feet wide, and the remaining 2,280 feet is 410 feet wide, the whole containing 46.30 acres.

South of the deep basin, and separated from it by a causeway 100 feet wide, is the timber-pond, 1,200 feet by 789.37 feet, and containing 21.75 acres. On the east side of the shallow and deep basins and timber-pond is a causeway 100 feet wide, which will afford berths for a large number of vessels to load or discharge cargoes. Along the western side of these basins are the different store-houses, offices, workshops, and manufactories required by this bureau for the accommodation of the various classes of workmen, and for the protection of its large quantities of material and general stores.

The wants of this bureau have been carefully considered, and it is believed that ample provision has been made for the accommodation of the different branches of work. The workshops are large, and are so grouped together as to bring the works most immediately or intimately connected conveniently near each other. It is proposed that the space al-

lotted for the saw-mill shall be excavated so as to form a timber-pond beneath the mill, and convenient for the storage of such timber as may be needed for immediate use. When all these store-houses and work-shops are erected and supplied with the necessary machinery and tools, they will enable this bureau to employ a very large number of workmen, and to meet all the demands that may be made upon it in cases of extreme emergency. Immediately south of the space allotted to the Bureau of Construction and Repair, and along the line of the deep basin, is the area assigned to the Bureau of Steam-Engineering. All the buildings which can ever be required for this bureau are provided for, and those in which the heaviest work will be performed are placed along the line of the basin-wall, so as to be convenient for putting heavy machinery into and out of vessels lying in the basin. Ample shops are provided for all the different branches of work to be performed, and store-houses for the storage of materials and finished work; and the whole establishment is such as to furnish all the facilities required at this station.

The board would have preferred placing the buildings and other improvements intended for the use of the Bureau of Equipment and Recruiting in close connection with those belonging to Construction and Repair and Steam-Engineering; but the form of the available land is such as to render such an arrangement difficult and inconvenient; the line of front being a straight line, and the width of the

island in that portion so limited as to involve the necessity of extending the works of the latter two bureaus along nearly the whole southern part of the entire front.

We have, therefore, devoted the whole eastern shore-line from the principal avenue leading across the island south as far as a point near the area allotted for magazine purposes for the use of the Bureaus of Construction and Repair and Steam-Engineering, and reserved the portion of the water-front from the same avenue north to and including the present steam-works for the use of the Bureaus of Equipment and Recruiting, Provisions and Clothing, Navigation and Ordnance.

By this arrangement vessels requiring repairs to their hulls or machinery would receive them at the lower basin, and, when completed, would be hauled to the upper end of the yard to complete their equipment and receive their equipment-stores and coal, batteries, and ordnance-stores, and their provision and clothing; all the store-houses and workshops for these different departments being in close proximity.

Sites have been assigned for all the workshops and store-houses required for the Bureau of Equipment and Recruiting, and they are arranged in a compact and convenient manner.

A large and commodious building is provided for a sail-loft and storage for canvas and sails, another for rigging-loft and storage of fitted rigging and cordage.

Shops for the manufacture of anchors, chains, and galleys, and suitable areas for the storage of anchors and chains, are indicated on the plan, and large store-houses are laid down for the storage of equipment-stores of dismantled vessels.

The coal-house is located near the water-front, and will be so arranged that coal may be received or delivered on board ships in an expeditious and economical manner. The capacity of the coal-depot is 25,000 tons. In the rear of it is another depot for the Bureau of Equipment and Recruiting, capable of receiving 12,000 tons. The rope-walk being necessarily a very long building could not be conveniently grouped with the other buildings of this bureau, but the site selected, although detached, is not far distant, and will be of convenient access.

The space selected for the Bureau of Provisions and Clothing is adjoining that for Equipment and Recruiting, and a sufficient amount of storage has been allowed to meet all requirements of a very large establishment.

This station being so far distant from others, and the wheat on this coast being of such excellent quality, it was deemed proper to provide a large bakery, with store-room for the storage of flour and bread. It is also believed that at a future day it will be found economical for the Department to manufacture the clothing for the seamen of the Navy on this coast, and therefore ample room has been reserved for this purpose.

As the operations of the Bureau of Navigation do not require much space, a portion of one of the buildings, within the area for Provisions and Clothing, has been assigned for the purpose.

The site selected for the Ordnance Bureau is at the extreme northern end of the upland, and is at present occupied in part by Steam-Engineering.

When the proposed new buildings for the last-named bureau are completed and occupied, workshops now occupied by it will answer an excellent purpose for the Ordnance Bureau, and each will be separate and distinct in itself. For the use of this bureau sites have been selected for all the necessary workshops and store-houses, and abundant space for gun and shot parks.

The magazine, coming also under charge of this bureau, is located near the extreme southern end of the island.

The Bureau of Medicine and Surgery does not require much room for yard purposes, nor does it require the exclusive occupation of water-frontage. We have allotted it a small space near the office building and dwellings for officers, which will be quite sufficient for its purposes.

The large naval hospital, also under charge of this bureau, is located toward the southern end of the island. It is a fine building, with ample grounds adjacent for cultivation and ornamentation.

The Bureau of Yards and Docks not requiring special use for water-front, has been located in a central position, and provision has been made for

its store-houses and workshops, stables, gas-works, and buildings for the preservation of engines, cars, &c.

An area has heretofore been allotted for marine barracks, officers' quarters, and parade-ground. To preserve uniformity in the arrangement of buildings it has been found necessary to move the northern boundary sixty feet farther north, and that boundary has been moved on the plan without detriment to other claims.

As before stated, the area of the upland is 741 acres; of the tule on the east side of the yard, now being fast filled in by the earth excavated from the new dry-dock pit, 135 acres; and of the tule on the northern and western end of the island, about 3,973 acres, making an aggregate of 4,849 acres. The areas appropriated for the various purposes of the navy-yard, according to the plan prepared by the board, are shown by the following table:

	Quay-wall, front	Front on deep basin.	Buildings.	Land.	Streets.	Water.	Total
Construction and Repair.	Feet	Feet	Acres	Acres	Acres	Acres	Acres
Workshops, store-houses, and offices			32.146	11.027	25.385		68.558
Dry-dock					1.987	1.385	3.372
Building-ways for twenty-four vessels				25.155	3.782		28.937
Basin for building-ways, (shallow)					6.671	23.744	30.415
Storage-ways for twenty-four to thirty-six vessels				19.153	4.685		23.838
Basin for storage-ways, (shallow)					4.086	9.458	13.544
Timber-basin, (reserve)					6.289	21.746	28.035
Fitting and rigging basin					5.667	20.552	26.219
Total construction and repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering.							
Workshops, store-houses, and offices			13.592	6.159	12.695		32.446
Steam-basin					8.589	26.054	34.643
Total steam engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089
Equipment and Recruiting.							
Workshops, store-houses, and offices	952½		10.755	8.541	12.453		31.749
Ordnance.							
Workshops, store-houses, and offices			6.795	12.859	14.872		34.526
Magazine, (land, including buildings)				22.448	6.364		28.812
Total ordnance	887⅔		6.795	35.307	21.236		63.338
Provisions and Clothing.							
Workshops, store-houses, and offices	525		4.327	1.484	5.612		11.420
Navigation.							
Workshops, store-houses, and offices			.298		.401		.699
Medicine and Surgery.							
Workshops, store-houses, and offices			.115		.133		.248
Hospital, (land, including buildings)				31.210	2.095		33.305
Total medicine and surgery			.115	31.210	2.228		33.553
Yards and Docks.							
Workshops, store-houses, and offices			5.373	8.440	6.110		19.923
Officers' quarters, (24)			.952	15.831	5.752		22.535

	Quay-wall, front.	Front on deep basin.	Buildings.	Land.	Streets.	Water.	Total.
Yards and Docks—Continued.							
	Feet.	Feet.	Acres.	Acres.	Acres.	Acres.	Acres.
Workmen's quarters, (28)			.578	5.493	2.333		7.826
Parks and squares				19.771	5.264		25.035
Bay road on southern and western shore, (3.017 miles)					18.231		18.231
Cemetery				6.675	.344		7.009
Total appropriated for yards and docks	263		6.903	56.200	38.034		101.137
Unappropriated.							
Reservation A, not including Bay road				21.830	1.910		23.740
Reservation B, not including Bay road				376.585	4.914		381.499
Reservation C				9.935	2.536		12.471
Total unappropriated				408.350	9.360		417.710
Total under yards and docks			6.903	464.550	47.394		518.847
Marine-barracks reservation, (land, including building-streets, not including Bay road)				24.681	2.310		26.991
Light-house reservation, (not including Bay road)				4.800			4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	102.939	563.784
Total high land, unappropriated				408.350	9.360		417.710
Area of large tule, all that part not appropriated, (Reservation D)							3,935
Total island (nearly) as increased by improvements							4,916

Unappropriated.							
Reservation A, not including Bay road				21.830	1.910		23.740
Reservation B, not including Bay road				376.585	4.914		381.499
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Area of large tule, all that part not appropriated, (Reservation D)							3,935
Total island (nearly) as increased by improvements							4,916

RECAPITULATION.

Construction and Repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089
Equipment and Recruiting	952½		10.755	8.541	12.453		31.749
Ordnance	887⅔		6.795	35.307	21.236		63.338
Provisions and Clothing	525		4.327	1.481	5.612		11.420
Navigation			.298		.401		.699
Medicine and Surgery			.115	31.210	2.228		33.553
Yards and Docks			6.903	56.200	38.034		101.137
Marine-barracks and reservation				24.681	2.310		26.991
Light-house reservation				4.890			4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	102.939	563.784
Total high land, unappropriated				408.350	9.360		417.710
Large tule, unappropriated, (Reservation I)							3,935
Total island (nearly) as increased							4,916

In arranging the plan of the yard we have adopted as the size of building-blocks, generally, 230 by 400 feet. Some of them are a little larger, and a few are smaller. The width adopted for the streets is 70 feet, except along the front of the railways for repairing or building vessels, where it is 150 feet, and along the deep basin, where it is 100 feet wide.

The subject of road-making is one of great interest and importance, and has received due consideration. In this country where all the rains of the season fall in a few weeks, and the character of the soil is such as to render the roads almost impassable during the rainy season, it becomes an imperative necessity that the utmost care should be exercised in their construction.

In the city of San Francisco the various kinds of wood pavements have been extensively used, but the results have not been favorable, and it is believed that they are now all regarded as failures; the authorities have abandoned the use of them and are resorting to other plans, the most popular of which are the Belgian block, the cobble-stone, and the macadam roads.

Some other plans are being experimented with, and we have made arrangements with parties in San Francisco to lay down some sample pavements for test. These will consist of a roadway 21 feet wide and 60 feet long for each kind, and they will be laid in a part of the yard where they will be sub-

ject to the severest tests, and be as equally exposed as possible.

The first sample will be what is known as the Parisen patent, and is similar to a pavement in the city of Washington, near the Arlington House. It will be put down by Mr. Frank M. Brown, the owner of the patent. This pavement is believed to be a good one if properly laid, but is very expensive. Its depth to the road-bed will be ten inches, and the cost $5.10¾ per square yard.

The next sample is that known as the hydro-carbonized brick pavement, and will be put down by the San Francisco Paving Company. This pavement is made of soft brick boiled in a mixture of coal-tar and sulphur; the bed is graded to the depth of 10¾ inches below the proposed surface of the pavement; a depth of 4 inches of wet sand, well rolled, is then laid upon it, common unprepared bricks are then laid flat-wise, in the ordinary herring-bone style, the joints being pretty large; these joints are then filled with hot coal-tar, and upon this lower course of bricks the prepared bricks are laid edgewise, each being first dipped in hot coal-tar, and the whole well grouted with coal-tar, thus forming a thickness of about six and three-quarter inches of brick laid on four inches of sand. We have seen specimens of this pavement in San Francisco and Sacramento, both of which appear to have stood remarkably well, the first named having been in use about two and the last five years.

That in San Francisco is in a public street where there is a very large amount of travel, and that at Sacramento at a crossing to a coal-yard, where the entire travel was confined to a certain part of the pavement. The cost of this pavement is less than either of the other two kinds to be tested, being $4.16 per square yard.

The other sample is the called asphalt road, and will be laid down by N. P. Perrine. This pavement is composed of broken lime-stone and asphalt mixed, and applied in a manner similar to that in which the roads in Paris are constructed, and will cost $4.50 per square yard.

These several kinds of pavements will be laid down in the yard at a point where a fair test can be made, but, of course, no opinion can be given of their relative merits until the results of actual use can be obtained.

The great extent of the yard will render an immense amount of paving of some kind necessary, if such roads are to be depended upon for the hauling to be done.

We are of the opinion that, in view of the great cost of paving and the great distances to be traveled over when the yard is completed, rail-tracks will be found the most economical and expeditious for the transportation of heavy materials and stores between distant points, and we have therefore laid down a system of tracks which will afford very easy access to all important points. These tracks should

be supplied with cars and trucks of various kinds, and steam-engines for running them.

The western side of the island being exposed to the wash of the waters of the Bay of San Pablo, it is necessary that some means should be adopted to prevent the encroachment of the water on that side of the island. We therefore recommend that a rip-rap wall be thrown up along the shore, and that a road-way be built entirely around that portion of the island.

There is a large quantity of stone laying along the shore, which will probably be sufficient for this purpose, and it is recommended that this work be commenced with a moderate force as soon as means can be obtained for the purpose.

In connection with the subject of road-building, the question of grades was considered.

The northern portion of the island, upon which the buildings and basins are located, is an undulating plain, a small part of which, comprising the tule-lands, is about five feet below the height of the quay-wall as established by the board, the remainder being dry land from five to twenty feet above the quay-wall, excepting a hillock of small area, which rises to the height of fifty feet. As a consequence of this formation of the ground, the amount of excavation required will be very moderate, and flat grades are practicable.

The excavation for basins is also reduced to a minimum by their location on the low tule-lands. The quay-walls fixed, as before stated, at a uni-

form height along the whole front of the yard, is the primary plane from which rises the grades of all the principal streets.

The proposed adoption of locomotives upon railways as the medium of traffic, and the possible ultimate use of traction-engines for the same purpose, rendered the adoption of easy grades necessary. Such grades are also best suited to the floor-lines of buildings located along the streets, the board therefore determined to fix the maximum grade at one foot rise in one hundred feet. A few exceptions to this rule were made in streets not adjacent to workshops, by an increase of the maximum to 2.15 feet per hundred, in order to adapt the grades to structures already erected.

These maximum grades are all at right angles with the quay-wall, and with the line of greatest traffic. Streets parallel with the quay-wall and the longitudinal axis of the buildings, and in the line of greatest traffic, have much lighter grades, no cases in the vicinity of the workshops exceeding five-tenths of a foot per hundred feet. Streets over which heavy boilers and engines will usually be moved have no grades above five-tenths, and the streets leading from the quay-wall and the ordnance-foundry to the gun-park have the same easy grades.

In connection with the grades of the streets was considered the subject of the proper grades for the building and repairing ways and the storage-ways for vessels. The adjustment of all the elements entering into this question led the board to adopt as

most suitable a grade of .75 foot per hundred. The grades and elevations above quay-wall coping are marked on the plan at the intersections of the different streets, and will readily be understood.

A long line of quay-wall having been projected, the attention of the board was directed to a careful consideration of the different modes of building such structures, and the adoption of such methods and material as would prove most economical, expeditious, and beneficial. The comparison was confined to two kinds of material, concrete and granite, the wall in either case to rest upon a properly prepared pile foundation.

In the English dock-yards, and in many other places where large heavy quay-walls are being built, concrete has almost invariably been adopted as the best material to be used, both on account of cheapness of first cost and also on account of its supposed superior durability. It is manufactured in large masses of any desired size and form, easily deposited upon properly prepared foundations, and arranged by workmen in bells or diving-armor, in the same manner as has been practiced in this country in constructing walls of granite for similar purposes. Careful estimates have been made in minute details of the cost of preparing these masses of concrete and placing them in position; liberal allowances were made for the cost of all material, and labor, and the entire use of Portland cement is contemplated.

The cost per linear foot of a concrete wall of suitable section, including the pile foundation and granite coping, is $278.98, while the estimated cost of a granite wall of the same section, including the same foundation, is $799.77 per linear foot, the cost of the granite being 286 per cent. greater than the cost of concrete. The materials for making this concrete are abundant and cheap in this vicinity except the cement, which would be imported from England. The labor required in its manufacture would be of the cheapest kind; indeed, on a large scale, the introduction of labor-saving machinery would greatly reduce the cost, the only skilled labor needed being in placing the blocks in the wall.

We have no hesitation in recommending the adoption of this method of construction in building the long line of quay-wall which we have projected.

The water-supply of the island has also received our careful attention. The most important element involved in this question is the source of supply. The topographical and climatic conditions of the island are such as to preclude the possibility of any perennial resource, such as is ordinarily available when artificial works for the supply of water are undertaken. There are no streams nor adequate springs. The numerous wells that have been sunk from time to time, even to considerable depths, have yielded only a scanty supply of inferior drinking water, while, in the case of an early experiment on the premises, in boring an artesian well, the at-

tempt was abandoned at the depth of 218 feet on account of finding no water except such as was found near the surface. Up to the present time the water-supply of the island, especially for house and ship purposes, has been rain-water collected on the building-roofs and stored in expensive masonry-cisterns, the capacity of which at the present time is about 1,390,000 gallons, exclusive of those of the marine barracks, hospital, and magazine; while for building purposes, steam-boilers, and the supply of cattle, the main dependence has been upon the yard-wells, from which generally the water has necessarily been obliged to be hauled, at no small expense, to the point of use. Under these circumstances, the decision of what may prove a reliable source of supply involved the most careful consideration, and in order to be able to present the most suitable selection, with a proper plan of works in connection therewith, the board have felt themselves called upon to make as thorough investigation of all the conditions of the locality as possible.

Having in view the fact that the adjoining town of Vallejo, as well as Oakland and the large city of San Francisco, are supplied from artificial reservoirs, filled chiefly by the rain-fall of their respective districts, the board was satisfied that the yard must be supplied by similar means. It was, however, aware of the experiment of the artesian well now being carried on at the Government arsenal at Benecia, the final success of which, if established within the time hoped for by the authorities of that

establishment, may undoubtedly influence the recommendations which it, in the meantime, feels compelled to make under the great urgency of the wants of the yard, which require operations to be immediately undertaken.

The works at Vallejo, and those at the Spring Valley Water Company, by the latter of which San Francisco is now supplied, were visited and examined, establishing in the mind of the board the conviction of the entire adequacy of the rain-fall storage system, where the conditions admit of its application, especially in a country like this, where none but the largest river-courses supply water throughout the season, all other streams remaining dry for at least half of the year. The application of *of* this system to the yard was obvious, although it remained a question whether the locality itself furnished the required elements, for its realization to the extent demanded. It was apparent, in case this should be answered in the negative, that we could with more certainty look to the adjacent territory, Vallejo and its connections, for the required supply, as the Vallejo Water Company has already established its feasibility.

It is obvious that the storage of any required amount of water on the system mentioned will depend on the two elements of available territory for a catchment area and the amount of rain-fall taken in connection with its mode of occurrence, the reservoir for storage being placed in a proper rela-

tion to the catchment area and to the locality where the water is to be finally used. So far as the territory of Mare Island is concerned, there can be no doubt, providing the requisite amount of rain-fall could be annually depended upon, that an abundant catchment area at a high elevation may be obtained, the only contingency in the matter being the rain-fall, which in some years is known to fall. At an elevation above the quay-wall coping of 110 feet, and above this to the highest point of the island, there are one hundred and forty-seven acres which can be drained into a reservoir, which may be so located as to command a head of about 100 feet above the said coping.

With a saving of twelve inches of rain-fall, and with reservoirs of sufficient capacity, there would annually be stored an amount of 48,000,000 gallons, amply sufficient for all the present wants of the yard, and probably for many years to come. This statement is made, however, not as a condition of things to be entirely depended upon for the yard-supply, but as an illustration of the general system by which this supply will be likely to be effected, and so far as the Island territory and the joint occurrence of its rain-fall are concerned, the feasibility of its being made to act a greater or lesser part in connection with other sources outside of it, which may be chosen for a supply.

The board has been informed of several sources of water-supply outside of the island by various

parties representing proprietorship, who severally have addressed letters on the subject. One of these, and the largest probably in the State of California, is Clear Lake, which lies about sixty miles north of the yard. A company has been organized for several years, whose object is to construct suitable works for the utilization of this lake, operations having already been commenced, although not upon the line intended eventually to pass through the vicinity of Vallejo.

The accompanying letter, marked "A," received from the president of the Clear Lake Water Company, states the essential objects of this company, and gives a description of their water-source.

The accompanying letter, marked "B," received from Messrs. Burrage & Tucker, states the existence of another source of water-supply near the town of Yountville, situated in Napa Valley, and to the north of the yard, the point being about twenty-four miles distant.

The Vallejo source is quite a large artificial reservoir or pond, located about three and a half miles from the town. It is formed by an earth-dam built across a narrow opening between high hills, its present area being estimated at about one hundred and sixty acres. The catchment area surrounding the reservoir is computed at over seven thousand acres, being in great part of a mountainous character, which quickly pours off the rain-fall into the pond. The elevation of the outlet of the discharge-pipe at the dam is about 32½ feet above the coping the

yard quay-wall, the entire head above this point being the elevation of the water-surface over the outlet, which ordinarily may be assumed at 35 feet, thus making the entire head over the quay-wall 67½ feet.

From the experience of the few years elapsed since the completion of this reservoir, taking into account its large dimensions, the quantity of water which has annually been stored, and the quantity distributed to the population of Vallejo, there seems no reason to doubt its capacity to furnish all the demands of the navy-yard, should it be decided to adopt this method of supply.

In the cases of the two former sources, it is evident that no reliance for an immediate supply for the yard can be assured.

The development of the extensive works proposed by the Clear Lake Water Company may require some years before they will reach this vicinity.

The proposition of the proprietors of the Yountville source does not, in the estimation of the board, commend itself for adoption by the Government, although there can be no doubt that its sole possession of an adequate water-source, within a reasonable distance, in which economical works might be established, would be attended with very great advantages.

The conclusion of the board in reference to this water-supply question is, to recommend the adoption of the proposition of the Vallejo Water Com-

pany, as given in the accompanying letter of its president, of the 7th instant, marked "C," addressed to the commandant of the yard, and by him referred to the board. The price demanded for the amount of supply seems reasonable compared with the rates understood to be now paid by the water-consumers of San Francisco to the Spring Valley Water Company, the price being about the same for a similar large quantity taken at once by our establishment.

In this recommendation it seems necessary to state the outline of the works required in connection with the delivery of the water at Vallejo at the point indicated by the company. It will be necessary, first, to connect with the company's pipe and lay across the strait a submerged pipe of, say, 5 inches interior diameter, leading to a proper fore-bay on the yard, placed at a sufficient elevation to obtain as much distributing head as the power of the company's reservoir and works will bestow; we can, probably, thus depend upon a head of about 60 feet above the coping of the quay-wall, as due to the pressure of the company's reservoir.

The fore-bay ought to be of sufficient capacity to hold a considerable quantity of water, at least 100,000 gallons, and be connected with the main distributing reservoir, which is to be placed at a sufficient elevation to give a high pressure over every building of the yard by means of a suitable pumping-apparatus, pipe, &c., by which this service-

reservoir may be filled. The location of the fore-bay and reservoir is recommended to be on the hill to the westward of the hospital, as marked on the plan.

By this arrangement it will be seen that the system of pipes conveying the water to the fore-bay, and the connection of a discharge-pipe from the distributing reservoir to this system with proper branch pipes, valves, &c., will also form the distributing system for the yard-service.

The proposition of the Vallejo Water Company is recommended as the only one which, in the opinion of the board, is immediately feasible. An agreement on the proposed terms, or lower if they can be had, may be entered upon for a certain number of years, while in the mean time the development in the general enterprise of water-works in the vicinity by other parties, with those that may follow on the island itself, through the undertaking of the storage of its own rain-fall, will probably lead to other more economical arrangements.

Reference has already been made to the feasibility of this last-mentioned plan, with the belief that it ought soon to be undertaken; although the annual rain-fall may not be regularly sufficient for the storage of a full supply of water, there may often happen seasons of abundance, when a considerable quantity can readily be stored.

We have caused such examinations to be made on the island as show a large catchment area, and a convenient site for a storage reservoir. The lat-

ter, when filled, as it often may be, will furnish a sufficiency for a very important supply for irrigation and other purposes.

Approximate estimates for the works required in connection with the supply from the Vallejo Water Company are as follows:

Pipe across Napa Straits	$7,000
Forebay and pumping apparatus	8,000
Distributing reservoir, main and service pipes	60,000
Pumping-house, hydrants, valves, &c.	4,000
Total	79,000

It is to be observed that all these works will be available for any other source of supply than that of Vallejo, except that the pipe across the straits might require some different location.

Appropriate estimates for reservoir, &c., for storing the rain-fall on the island, are—

Storage reservoir	$15,000
Pipes, &c., to connect with distributing reservoir	5,000
Contingencies	2,000
Total	22,000

The instructions of the board require its consideration of the cost and feasibility of an artesian well. They would state that, pending the operations at the United States arsenal at Benicia, be-

fore referred to in this report, and in view of a like experiment tried on this island several years ago, it considered this plan still problematical. Of its feasibility there can be no means of deciding in advance of actual success, proved in some near quarter where the geological conditions are like those of the island, such as is now hoped for at Benicia.

The subject of lighting the yard has received due consideration by the study of the present mode of effecting this purpose in comparison with other means with which we are acquainted. The present method is founded on the use of gasoline employed in conjunction with atmospheric air, the operation being effected by a very simple apparatus which produces the required mixture of illuminating-gas, and forces the same into the large holder, from which by the necessary pipes it is carried to the points of consumption.

It is obvious from the nature of the principle involved in the manipulation of this gas, and providing the gasoline is of a proper gravity, that it may be made of high illuminating power, as is proven by photometrical tests. That it is economical, as compared with the present charges for gas in the cities and towns of this vicinity, is shown by the expenditure of material and labor employed from May 1 to September 30 of the past year, in its manufacture, during which the price of the gasoline has been reduced 20 per cent. from its former cost. During this time, we find the cost

of manufacture to be $2.65, currency, per thousand cubic feet, charging in the account the whole wages of the gas-maker, who not only superintended the making of gas, but the repairs and maintenance of all the works.

The simplicity of this method of gas-lighting, in our opinion, commends itself for limited and compact communities. It is employed in several small towns on this coast, and has, we learn, given good satisfaction, for it has been continued several years at these places. There are reasons, however, for not recommending it as a permanent resource for this yard, especially when its works shall have become more numerous and spread over a greater extent. The enlargement of the plan will involve the handling of greater quantities of gasoline, which thus proportionally may be considered to increase its danger, though on the present small scale of use and very careful handling, there is but little apprehension. It is an article of importation to this market, and by a few hands, to whom a time of scarcity or combination is a temptation to raise the price; while on the other hand the loss by its rapid evaporation, and its danger from careless exposure to fire, renders the storage of a large quantity inadmissible, when we might otherwise wish to avail ourselves of a low market to purchase it.

The present location of the gas-works and holder in our recommendation of the buildings of the yard is appropriated to the pumping-engine house for the new stone dry-dock. This location is between the

wings of the present smithery, No. 69, and in our opinion is the most suitable point for such an object. This arrangement will necessitate the substitution of another site for the gas-works, which in our plan we recommend to be on one of the blocks, No. 51, assigned to the department of yards and docks.

The demand for the construction of the dock pumping-works of course will require the removal of the present gas-works and the commencement of the new establishment, and it is recommended that the operations therefor be soon undertaken. The new gas-works we recommend to be on the coal system of manufacture, with a capacity for making 40,000 feet per diem, which will be ample for many years to come for all the establishments of the island. For the purpose of commencing the improvements proposed by the board, appropriations will be required for the objects mentioned in the following schedule of works; operations upon the objects to be commenced in the order in which they are named, and the whole to be finished within fifteen years, at the cost approximately stated opposite each object.

Schedule of Works to be First Built.

1. For grading 100,000 cubic yards per annum for ten years	$500,000
2. The quay-wall, 500 linear feet per annum, commencing at the south side of block No. 9 and running thence southerly to north side of block No. 29, afterward to be extended northerly to north line of block No. 2	2,500,000
3. For extension of floating-dock basin, and building and repairing ways, 675 feet, to include ways No. 8 and iron floating-dock, to be commenced as soon as the quay-wall, opposite, shall have been constructed	1,750,000
4. For wood and metal workshops for yards and docks, south and east side of square No. 34, 675 feet long	500,000
5. For carpenter and joiner shops for construction and repair, on square No. 11, 400 feet long	300,000
6. For machine-shop, store-house, and offices for construction and repair, all of square No. 39, 1,060 feet in length	700,000
7. For store-house and office for yards and docks, south side of square No. 35, 340 feet long	250,000
8. For temporary erecting-shop for steam-engineering, to be ultimately used for ordnance gun-carriage shops, north side of block No. 3, 400 feet	300,000
9. For sail-loft and store east side of block No. 5, 400 feet	300,000
10. For general store for ordnance, east side of block No. 18, 317 feet	250,000
11. For shell-house for ordnance, east side of block No. 17, 360 feet	250,000

The south half of block No. 8 to be temporarily occupied by equipment and recruiting for stores of returned vessels. For the permanent use of the Bureau of Steam-Engineering.

12.	For smithery, the east side of square No. 26, 400 feet long	200,000
13.	For machine-shop, the east, south, and north sides of square No. 27, 600 feet in length	500,000
14.	For boiler-shop, the west side of square No. 27, (for temporary use, to be eventually used as an erecting-shop,) 400 feet long	250,000
15.	For store-house, the east side of block No. 46, 400 feet long	300,000
16.	Foundery, east side of square No. 28, 400 feet long	250,000
17.	For construction-basin complete	1,500,000
	Total for fifteen years' construction	10,600,000

We have the honor to be, with great respect, your obedient servants,

W. P. S. SANGER,
Civil Engineer, United States Navy.
CALVIN BROWN,
Civil Engineer, United States Navy.
FRANKLIN A. STRATTON,
Civil Engineer, United States Navy.

Commodore C. R. P. Rodgers, U. S. N.,
Chief of Bureau Yards and Docks,
Navy Department, Washington, D. C.

A.

Office of the
Clear Lake Water-Works,
3 and 5 Front Street,
San Francisco, November 3, 1873.

[P. O. Box 1443.]

Dear Sir: In view of the well-authenticated fact that the United States navy-yard at Mare Island should have an increased supply of pure fresh water at an early day, to meet the requirements of the Government at that most important station, we would respectfully inform you that the Clear Lake Water-Works, (a corporation duly organized under the laws of the State of California, and having its principal place of business at San Francisco,) is expecting within a reasonable period to afford abundant facilities for the supply of water to the navy-yard, Vallejo, Benicia, and other points on and near the line of its proposed canals, with their adjuncts, for bringing the waters of Clear Lake to the city of San Francisco.

Our source of supply, Clear Lake, is one of the largest water-sources in the State of California. It has an area of about eighty square miles; its average depth is about forty-five feet; it stands at an elevation above the sea of about 1,500 feet, and it is fed by several large streams draining a mountainous surface of about four hundred square miles.

The company is now actively engaged in the work of construction, though not on the main line to San Francisco, which will pass near Mare Island. The water will be brought at an ample height to cover

all the buildings at the navy-yard. Its quality has been thoroughly tested by assays made by Professor Rising, of the University of California, Professor Falkenan, State assayer of California, and Professor Price, of this city; and it is pronounced by them to be exceedingly well adapted to domestic and industrial purposes.

The Clear Lake Water-Works fully expect to be in a position in a comparatively short time to enter into contract on the most favorable terms to supply the navy-yard with all the water it can require under any circumstances. It has, therefore, seemed to the board of trustees that you should be made acquainted with these facts at this time, in order that any arrangements for the supply of water now needed may be of such a temporary nature as not to prevent the Government from availing itself hereafter of the facilities which only this company can furnish.

Very respectfully, yours,

JOHN BENSLEY,
President Clear Lake Water-Works.
SAMUEL J. C. SWEZEY,
Secretary.

Capt. W. P. S. Sanger,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

B.

Yountville, October 30, 1873.

Sir: Understanding that a supply of pure fresh water is needed at the Navy-Yard, we wish to call

your attention to a supply in our possession which we feel sure will amply fill all your requirements in that respect.

The stream is situated about eleven miles from Napa City, across the valley on the east side from Yountville. It is a never-failing stream of pure spring water. We own two hundred acres of land through which this stream passes, probably over one mile in length on this land. It is estimated there is at least 150 feet fall in this same distance.

There are ample facilities for making dams and constructing reservoirs on the stream that will alone hold four times the amount of water you now require.

We will sell these two hundred acres of land with all our rights to the stream, excepting we retain the right and privilege under all circumstances of building and maintaining a dam across the stream, if none is built by the purchaser near, at a point high enough to convey the water to our present building, with at least ten feet head at the point of starting; also the right to enter upon said land at any and all times for the purpose of laying or repairing an end-pipe to connect with the water in said dam, and the full control of all the water that will run in said pipe. With these reservations secured to us we will convey all our right and title to the balance for $10,000. It would give us much pleasure to show you the property before the rains commence. Whatever conclusions you may arrive at please to

inform us as soon as convenient afterwards.

Yours truly, BURRAGE & TUCKER.

Capt. W. P. S. Sanger,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

C.

Vallejo, November 7, 1873.

Proposal of the Vallejo Water Company to supply water to the Mare Island Navy-Yard:

The Vallejo City Water Company will furnish pure fresh water to the extent of 33,000 gallons per day, or 1,000,000 gallons per month, delivered from the pipe of the company at the foot of Georgia street, in the city of Vallejo, for the sum of $5,000 in United States gold coin per annum, payable in twelve equal monthly payments of $416.67 each. The Government to furnish its own pipe or mode of conveying said water to Mare Island.

[Seal] A. CHOBOT,
President of the Vallejo Water Company.
PAUL R. HUBBS, Secretary.

Rear-Admiral John Rodgers, U. S. N.;
Commanding Mare Island Navy-Yard.

Respectfully referred to the board of civil engineers.

JOHN RODGERS,
Commandant.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit P-1. Filed June 9, 37. W. B. Maling, Clerk.

U. S. EXHIBIT "Q"

U. S. Surveyor General's Office, California.

San Francisco, June 29, 1876

Hon. U. J. [illegible.]
Acting Comr. Genl. Land Office
Washington, D. C.

Sir:

I have the honor to transmit herewith, for your approval, contract and bond of James E. Freeman, Dep. Surveyor, dated June 28th, 1876, liability $200. payable from appropriation for survey of Private Land Claims—during the fiscal year ending June 30, 1876.

Very Respectfully
H. G. ROLLINS
U. S. Sur. Genl. for California

CONTRACT AND BOND OF JAMES E. FREEMAN

This Agreement, made this 28th day of June, 1876, between H. G. Rollins, Surveyor-General of the United States, for California, acting for and in behalf of the United States, of the one part, and James E. Freeman of San Francisco of the other part,

Witnesseth, That the said James E. Freeman for and in consideration of the conditions, terms, provisions and covenants hereinafter expressed, and according to the true intent and meaning thereof, does

hereby covenant, promise and agree with the said Surveyor-General, in his capacity aforesaid, that the said James E. Freeman in his own proper person, with the assistance of such Chain-Men, Axe-Men, Flag-Bearers, and others, as may be necessary, agreeably with the laws of the United States, and in strict conformity with the printed Manual of Surveying Instructions, and the printed Instructions to Surveyors-General, of June 1, 1864, issued by the General Land Office, which is hereby incorporated with, and made part of, this contract, and with such special Instructions as he may receive from the Surveyor-General, in conformity therewith, will well, truly and faithfully run, measure and mark all lines necessary to Survey the Exterior Lines of the "Isla de la Gegua or Mare Island" Granted to Victor Castro, confirmed to Bissell and Aspinwall; and that he will complete these surveys in the manner aforesaid and return the *true and original* Field-Notes thereof to the Office of the said Surveyor-General, on or before the 1st day of September, next ensuing the date hereof, (acts of God excepted,) on penalty of forfeiture and paying to the United States the sum specified in the annexed Bond, if default be made in any of the foregoing conditions.

And it is further expressly stipulated, and made a condition of this contract, that the surveys herein described shall not be commenced before the first day of the fiscal year ending June 30, 187..

And the said H. G. Rollins, in his capacity as Surveyor-General as aforesaid, covenants and agrees

with the said James E. Freeman that on the completion of the surveys above named, in the manner aforesaid, there shall be paid to the said James E. Freeman on account of the United States, by the Treasury Department, upon the receipt of his account at the U. S. General Land Office, properly certified by the U. S. Surveyor-General, and accompanied by the approved plats of the surveys for which the account is rendered, as a full compensation for the whole expense of surveying and making return thereof, at the rate of Fifteen dollars for Rancho Boundaries retraced, per mile, for every mile and a part of a mile actually run and marked in the field, *random lines and offsets not included.* And it is further understood and agreed by and between the parties to this agreement, that the said surveys will not be approved by the said U. S. Surveyor-General unless they shall be found to be in exact accordance with the requirements in the printed Manual of Surveying Instructions; *Provided,* also, that no member of Congress, or subagent, or contractor, shall have any part or interest in this contract, and that no payment shall be made for any surveys not executed by the said U. S. Deputy-Surveyor himself, in his own proper person.

In Testimony Whereof, the parties to these Articles of Agreement have hereunto set their hands and seals the day and year first above written.

H. G. ROLLINS [Seal]
U. S. Surveyor-General for California.

Witness to U. S. Surveyor-General's Signature,

Signed, sealed and acknowledged before us,

J. A. ROBINSON

GEO. L. TAYLOR

JAS. E. FREEMAN [Seal]

U. S. Deputy-Surveyor.

Witness to U. S. Deputy-Surveyor's Signature,

Signed, sealed and acknowledged before us,

J. A. ROBINSON

GEO. L. TAYLOR

I, J. E. Freeman, U. S. Deputy-Surveyor, do solemnly swear that I will truly, faithfully and impartially execute the surveys mentioned in the foregoing Agreement, to the best of my skill and ability, in accordance with the laws and instructions therein mentioned.

JAS. E. FREEMAN

U. S. Deputy-Surveyor.

Sworn and subscribed by the said Jas. E. Freeman before me, this 29th day of June, A. D. 1876.

J. A. ROBINSON

U. S. Commr.

(Each name must be signed in full in the presence of two witnesses, and the acknowledgment must be made before an officer having a Seal.)

Know all Men by these Presents, That we, James E. Freeman of San Francisco as Principal, and R. P. Clement & John Center as Sureties, are held

and firmly bound to the United States in the Sum of Four Hundred dollars, lawful money of the United States, (being double the estimated amount which would be due by the United States to the said James E. Freeman on the completion of the surveys named in the agreement entered into on the 28th of June, 1876, between H. G. Rollins, as U. S. Surveyor-General for California, and the said James E. Freeman hereto annexed) for which payment well and truly to be made, we bind ourselves, our heirs, executors and admistrators, and each and every of us and them, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals, this 29th day of June 1876.

The Condition of this Obligation is such, That if the above bounden James E. Freeman shall well and truly and faithfully, according to the laws of the United States, and the instructions of the Surveyor-General, and in strict conformity with the printed Manual of Surveying Instructions, make and execute the surveys which are required to be made by him by the said agreement, in the manner prescribed thereby: And shall also make due return of the said original notes thereof, in the manner and within the time prescribed by said agreement and instructions, or within such extension of the said time as the said Surveyor-General may afterwards designate, then this obligation to be void; otherwise, and in default of a complete and full compliance

with either or any of said obligations in said agreement, it shall remain in full force and effect.

JAS. E. FREEMAN [Seal]
R. P. CLEMENT [Seal]
JOHN CENTER [Seal]

Signed, sealed and acknowledged before us
J. A. ROBINSON
GEO. L. TAYLOR

State of California,
City & County of San Francisco.

On this 29th day of June, 1876, personally appeared before me R. P. Clement and John Center who, being duly sworn, depose and say, each for himself, and not for the other, that they are worth the sum of Four Hundred dollars, over and above their just debts and liabilities, or property exempt from execution.

R. P. CLEMENT [L. S.]
JOHN CENTER [L. S.]

Subscribed and sworn to before me, this 29th day of June A. D., 1876.

J. A. ROBINSON
U. S. Commr.

OATH

Prescribed to be taken by all persons in the Public Service, by Act of Congress, Approved July 2, 1862.

I, James E. Freeman do solemnly swear that I have never voluntarily borne arms against the United States, since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority, or pretended authority, in hostility to the United States; that I have not yielded a voluntary support to any pretended Government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further solemnly swear, that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

JAS. E. FREEMAN [Seal]

Subscribed and sworn to before me, this 29th day of June, 1876.

J. A. ROBINSON

U. S. Commr.

CERTIFICATE

I, H. G. Rollins, U. S. Surveyor-General for California, do hereby certify that, in my opinion, the sureties to the within Bond are sufficient, and I hereby approve the same.

Witness my hand and seal, this 29th day of June A. D. 1876.

H. G. ROLLINS
U. S. Surveyor-General for California.

Recd. with Sur. Gen. letter of June 29 '76
M14291 Div. #2 297 3/4

CONTRACT AND BOND

Surveyor-General's Office
San Francisco, June 28, 1876
H. G. ROLLINS,
Surveyor-General
JAMES E. FREEMAN
U. S. Dep'y-Sur.

$200.

Approved July 11, 1876.
Closed

Recorded in Contract Book, Vol. 5, page 146.

U. S. SURVEYOR-GENERAL'S OFFICE

San Francisco, Cal.
July 19th, 1877.

James E. Freeman,
U. S. Deputy Surveyor.

Sir,—

Whereas, it appears by a certified cpy of a decree placed on file in this office, that the claim of George W. Bissell and William H. Aspinwall to a tract of land named Isla de la Yegua, or Mare Island, has been finally confirmed by The Commission for ascertaining and settling the Private Land Claims in California, and by the U. S. District Court for the Northern District of Cal. And Whereas, application has been made, by the interested parties, for a survey and location of said claim, I have thought proper to appoint you my Deputy in this special case, for the execution of the Survey thereof.

Agreeably to the decree in the matter, the claim herein referred to is confirmed in favor of the said claimants, to the following effect: "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called Isla de la Yegua; or Mare Island, and being an Island is bounded by the water's edge."

Section 7 of the Act of Congress of July 1st, 1864, provides:

"That it shall be the duty of the Surveyor-General of California, in making Surveys of the Private Land Claims finally confirmed, to follow the Decree of Confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in a compact form. And if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as nearly as practicable, in a compact form."

You will therefore make your Survey in accordance with the requirements of the law, and said Decree of Confirmation.

You will therefore accurately ascertain and properly measure, run and mark the exterior boundaries of the claim, and restrict it to the confirmed quantity.

In all other respects you will comply with the printed instructions of this office, dated April 19th, 1864, a copy of which is herewith inclosed for your information and guidance.

[Seal] H. G. ROLLINS,
U. S. Surveyor-Gen'l, California.

O 38.856 E 4

Duplicate

Instructions,

July 19th, 1877

RANCHO

Isla de la Yegua, or Mare Island

JAS. E. FREEMAN,

Dep. Surveyor.

U. S. Surveyor General's Office

San Francisco, Cal., Aug. 6, 1879.

A full true and correct copy of the original as the same remains of record and on file "in duplicate" in this office.

Attest:

[Seal] THEO. WAGNER,

U. S. Sur. Gen'l.

No. 307

George W. Bissell et al.

vs.

The United States

In this case after hearing the proofs and allegations it is adjudged of commission that the claim of the said petitioners here in is valid and it is therefore decreed that their application for a confirmation there of be allowed.

The place of which confirmation is hereby given is situate in the bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and being an Island is bounded by the waters edge.

R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

[Endorsed]: No. 307. G. W. P. Bissell et al. Isla de la Yegua. Decree of Confirmation. Filed in office May 8, 1852. Geo. Fisher, Secy. Recorded in Record of decisions Vol. 2 page 647. Geo. Fisher, Secy.

[Insignia]

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General, for California.

307? — 311

The United States

vs.

G. W. P. Bissell & W. H. Aspinwall

"Ysla de Yegua, or Mare Island"

October 13, 1855. Filed Transcript from U. S. Land Com.; in case No. *307*.

Febry. 1, 1856. Filed Notice of Appeal from Atty. Genl.

March 2, 1857. Filed Decree of Confirmation.

April 1, 1857. Filed Order granting Appeal.

I, Southard Hoffman, clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full true and correct copy of the Register entries in the case of the United States vs. G. W. P. Bissell & W. H. Aspinwall No. 311 in said court, and I further certify that on the Minutes of said Court for the 2nd day of March 1857 an entry appears enumerating a number of cases among which is the case of the United States vs. Bissell & Aspinwall to which the following minute is appended "Decree of confirmation was entered in each of these cases by consent of the United States Dist. Attorney." And after due and diligent search I have been unable to find any Decree of Confirmation on file or of record in said case.

Attest my hand and seal of said District Court, this 4th day of August, A. D. 1879.

[Seal] SOUTHARD HOFFMAN,
Clerk, U. S. Dist. Court, Dist. Cal.

[Insignia]

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General, for California.

FIELD NOTES
of
The survey of "Isla de la Yegua" or
"Mare Island."
Situated in Sonoma County, State of California
Granted by Juan B. Alvarado to
Victor Castro May 20th, 1841.
Finally confirmed to
Geo. W. Bissell & William H. Aspinwall,
by the U. S. District Court, March 2d, 1857.
Surveyed by James E. Freeman.
Date of Contract June 28th, 1876.
Date of Instructions July 19th, 1877.
Survey commenced July 24th, 1877.
Survey completed August 1st, 1877.

PRELIMINARY OATH OF ASSISTANTS.

I, ...do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

.....

Subscribed and sworn to before me, this.....day of.....187....

.....

U. S. Deputy Surveyor

We, Daniel Scully and N. W. Brew do solemnly swear that we will faithfully execute the duties of Chain Carriers; that we will level the chain upon uneven ground, and plum the tally pins whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

his
DANIEL X SCULLY
mark
N. W. BREW

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, Thomas Dixon do solemnly swear that I will well and truly perform the duties of Flagman according to instructions given me, and to the best of my skill and ability.

THOMAS DIXON.

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLEY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, John Charlton, do solemnly swear that I will faithfully execute the duties of chain carrier flagman according to the best of my skill and ability.

JOHN W. C. CHARLTON.

Sworn and subscribed to before me this 25th day of July, 1877.

CHAS. W. RILLEY,
Justice of the Peace in and for Vallejo,
Township—Solano Co., Cala.

In order to connect the survey of Mare Island with a section corner of the Public Land Survey's, I begin at the quarter sec. corner, bet. secs. 13 & 18. Ranges No. 3 & 4 West. Township No. 3 North, Mt. Diablo base & Meridian and run South 120 chains to the cor. of secs. 19, 24, 25 & 30.

Now commencing at the water edge on the Easterly side of Mare Island, West of the sec. corner set a post 4 x 4 x 40 inches marked S. 24 & 25 bears West 25 links distant standing by a prominent flag pole of the U. S. Coast Survey.

July 24th, 1877.

Thence along the water's edge at ordinary high water mark.

Var. 16° 15′ E.

1	S. 40° E.	23.90	The cor. of secs. 19, 24, 25 & 30 on main land brs. N. 46° E.
		31.40	
2	S. 27½° E.	12.70	S. E. cor. of Magazin brs. West 50 lks.
		15.00	

3	S.	40¼°	E.	3.50
4	S.	36½°	W.	3.50
5.	S.	69°	W.	7.50
6	S.	16°	E.	3.70
7	S.	13¼°	W.	2.50
8	S.	41°	W.	2.60
9	S.	75°	W.	1.60
10	S.	86½°	W.	5.00
11	S.	30°	W.	4.20
12	S.	85½°	W.	2.00
13	S.	62°	W.	8.10 Light House 2 chs. North.
14	N.	54°	W.	40.00
15	S.	80°	W.	2.30
16	S.	86½°	W.	3.50
17	N.	74½°	W.	3.60
18	N.	66½°	W.	2.70
19	N.	33°	W.	1.90
20	N.	87°	W.	1.00
21	N.	48½°	W.	1.84
22	N.	47½°	W.	10.50
23	N.	77°	W.	2.50
24	S.	55°	W.	2.50
25	N.	43½°	W.	1.00
26	N.	31°	W.	29.00
27	N.	60½°	W	3.20
28	S.	77°	W.	2.90
29	N.	5°	W.	4.50
30	N.	23½°	W.	4.30
31	N.	31°	E.	1.20
32	N.	33½°	W.	4.70
33	N.	25°	W.	3.30
34	N.	32½°	W.	10.00
35	N.	25½°	W.	26.10 S. W. Cor. of Barracks brs. N. 44 E.
36	N.	4½°	E.	2.00 July 25th, 1877.
37	N.	24°	W.	5.50
38	N.	30°	E.	3.30
39	N.	31½°	E.	2.20
40	N.	17°	E.	5.40 S. W. cor. of Barracks brs. S. 75° E.

41	N. 31°	W.	6.00	
42	N. 40°	W.	4.00	
43	N. 50½°	W.	3.30	
44	N. 83½°	W.	2.00	
45	N. 16°	W.	2.70	
46	N. 43°	W.	1.90	
47	N. 14°	W.	1.70	
48	N. 72½°	W.	1.40	
49	N. 18½°	W.	5.60	
50	N. 10°	W.	7.00	
51	N. 26½°	W.	7.00	
52	N. 19°	E.	4.20	
53	N. 22°	W.	6.00	To Tide Lands thence along Tide Lands.
			12.00	
54	N. 34°	W.	24.00	
55	N. 40°	W.	44.00	
56	N. 52°	W.	44.00	
57	N. 61°	W.	64.00	
58	N. 64°	W.	36.00	
59	N. 70°	W.	196.00	
60	N. 61°	W.	40.00	
61	N. 62°	W.	15.00	
62	N. 58¼°	W.	25.00	
63	N. 67°	W.	13.50	
64	N. 86¼°	W.	4.00	A fishermans cabin 1 ch. North.
				July 26th, 1877.
65	N. 50½°	W.	7.50	
66	N. 79½°	W.	18.00	
67	N. 55°	W.	5.00	
68	N. 81°	W.	23.00	
69	N. 87½°	W.	10.00	Leaves San Pablo Bay.
			"	To mouth of Sonoma Creek — comes from N. W.
70	N. 63¼°	W.	40.00	
71	N. 23¼°	W.	8.00	Point of Land at the confluence of the Huichica Slough & Sonoma Creek brs. N. 50° W. about 10 chs. dist. Thence along Huichica Slough.

72	N. 26¾°	E.	4.50	
73	N. 63½°	E.	11.50	
74	N. 87½°	E.	23.00	
75	N. 87°	E.	41.00	
76	East		11.50	
77	S. 74½°	E.	40.00	
78	S. 85½°	E.	10.70	
79	N. 75¼°	E.	9.50	
80	N. 60½°	E.	18.00	To a point opposite the junction of South or "Navy Yard" Slough with "Middle Napa" Slough, thence up South or Navy Yard Slough.
81	S. 36°	E.	2.30	
82	S. 1½°	W.	7.00	
83	S. 5°	W.	11.70	
84	S. 6½°	E.	7.50	
85	S. 37°	E.	7.00	July 27th, 1877.
86	S. 75½°	E.	4.00	
87	East		6.70	To the Westerly Mouth of Montgomery Slough crs. S. E. 2 chs. wide.
88	N. 41°	E.	4.00	
89	N. 35½°	E.	12.00	
90	N. 22°	E.	12.50	
91	N. 3½°	E.	26.00	
92	N. 10°	W.	22.00	
93	N. 56½°	E.	5.00	
94	S. 65½°	E.	20.00	
95	S. 78°	E.	4.00	
96	N. 87½°	E.	11.00	
97	S. 61°	E.	1.50	
98	S. 52°	E.	4.40	
99	S. 3½°	E.	5.50	
100	S. 15°	W.	10.40	
101	S. 6¼°	W.	8.00	
102	S. 8°	E.	11.00	
103	S. 30°	E.	8.50	To Easterly Mouth of Montgomery cut off or slough crs. S. W.
			9.98	Over same.

104	S. 74½° E.	20.00	
105	East	21.00	
106	N. 56¼° E.	12.50	
107	N. 23¼° E.	8.00	
108	N. 11½° E.	8.50	
109	N. 63½° E.	9.00	
110	N. 60½° E.	6.58	
111	S. 63¾° E.	13.76	
112	N. 64½° E.	12.60	
113	N. 82° E.	3.18	July 28th, 1877.
114	S. 23¾° E.	2.18	
115	S. 25½° W.	4.47	
116	S. 61¾° W.	8.94	
117	S. 35½° W.	28.13	
118	S. 10¾° W.	9.60	
119	S. 33° E.	23.20	
120	S. 15° E.	16.14	
121	S. 51½° E.	14.56	
122	S. 77¾° E.	10.53	
123	N. 75¼° E.	17.90	
124	N. 43½° E.	39.50	
125	N. 60½° E.	11.92	
126	S. 73° E.	4.97	
127	S. 9° E.	23.55	Boat cut off or Dutchmans
128	S. 46¾° E.	23.76	slough 1 ch. wide.
129	S. 65½° E.	34.00	
130	N. 89° E.	56.56	Leave Navy Yard or South Slough and enter creek.
131	S. 78½° E.	17.10	
132	S. 9½° W.	60.00	
133	S. 4½° E.	42.70	To South Easterly mouth of Boat Cut off or Dutchmans slough 6 chs. wide co. N. W.
134	S. 13¾° W.	13.91	
135	S. 16½° E.	40.50	
136	S. 31½° E.	23.11	
137	S. 42½° E.	24.60	
138	East	23.21	To the Northerly cor. of Machine Shop.
			Leave Tide Lands.

139	S. 40½° E.	28.50	July 29th, 1877.
140	S. 24½° E.	8.63	To Ferry Boat Wharf co. N. E. & S. W.
		14.00	To Dry Dock.
		33.15	
141	S. 42° E.	37.42	
142	S. 38° E.	33.46	
143	S. 19° E.	6.45	To the place of beginning. Containing 5227-22/100 acres

GENERAL DESCRIPTION

With the exception of a narrow strip of land on the Easterly side of the Island, all that portion where the Navy Yard is situated extending Southerly from the Machine shop, is high dry ground rising gradually towards the South.

At the Southerly end of the Island the bluffs appear to be about 200 ft. in height—soil generally first rate.

That portion extending North Westerly from the Machine shop, is tide or swamp land producing tule & other salt marsh grasses.

The "Boat Cut off" known also as "Dutchmans slough" is about 60 lks. wide near its Westerly end —widening out towards the South Easterly end to 8 or 10 chains.

The South or Navy Yard slough varies in width from 6 to 10 chains.

The Northern boundary is entered by numerous small sloughs which ramify this portion of the Island in every direction. Owing to the action of the tides all the sloughs are very broad at their entrance but narrow rapidly as they extend inland.

Sailing vessels of Light Draught can pass around Mare Island by way of South or Navy Yard slough.

Several Iron Monuments are erected near the water's edge along the Northern boundary with notices thereon forbidding persons to trespass on the lands, as they are claimed by the U. S. Government.

August 1st, 1877.

JAS. E. FREEMAN

WE DO HEREBY CERTIFY, that we assisted Jas. E. Freeman, U. S. Deputy Surveyor, in surveying the boundary lines of the Rancho Isela de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall, and that said Rancho has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments established according to the laws of the United States, and the instructions of the Surveyor-General.

.....Compassman,

N. W. BREW Chainman,

JOHN W. C. CHARLTON Chainman,

His

DANIEL X SCULLY Axeman,

Mark

THOMAS DIXON } Flagman.

Subscribed and sworn to before me this 1st day of August, 1877.

CHAS. W. RILLEY,
Justice of Peace
Vallejo—Solano Co., Cala.

I, Jas. E. Freeman, U. S. Deputy Surveyor, do solemnly swear that, in pursuance of instructions from H. G. Rollins, U. S. Surveyor-General for the State of California, bearing date the 19 day of July, 1877, and in strict conformity to the laws of the United States and the said instructions from the Surveyor-General, I have well and faithfully surveyed the boundary lines of the Rancho Isla de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall and I do further solemnly swear that the foregoing are the true and original field notes of said survey.

JAMES E. FREEMAN,
U. S. Deputy Surveyor.

Subscribed by said Jas. E. Freeman, U. S. Deputy Surveyor, and sworn to before me, a U. S. Commr. in and for the County of San Francisco in the State of California, this 29th day of Aug., 1877.

J. A. ROBINSON,
U. S. Commissioner.

U. S. Surveyor General's Office,
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing transcript has been correctly copied from the original field notes as the same remain of record and on file in this office.

Witness my hand and official seal the day and year in this certificate written.

THEO. WAGNER
U. S. Sur. Gen'l.

T.4 N. R.5 W.

T.4 N., R.4 W.

ISLA-DE L

George H.
Surveye
O. S. S

Jame

Cond

Middle Marsh Slough

Hutchins Slough

Montgomery

Navy Yard

Steamer

Boat Cut off

Ditch main

B A

T.3 N. R.5 W.

T.3 N. R.4 W.

Recd with Sur. Genl. letter of Nov. 5, 1877

Report 31487

T. 4 N., R. 4 W

PLAT

of

ISLA DE LA YEGUA OR MARE ISLAND

finally confirmed to

George W. Bissell and William H. Asphmall

Surveyed under instructions from the

U. S. SURVEYOR GEN^L

by

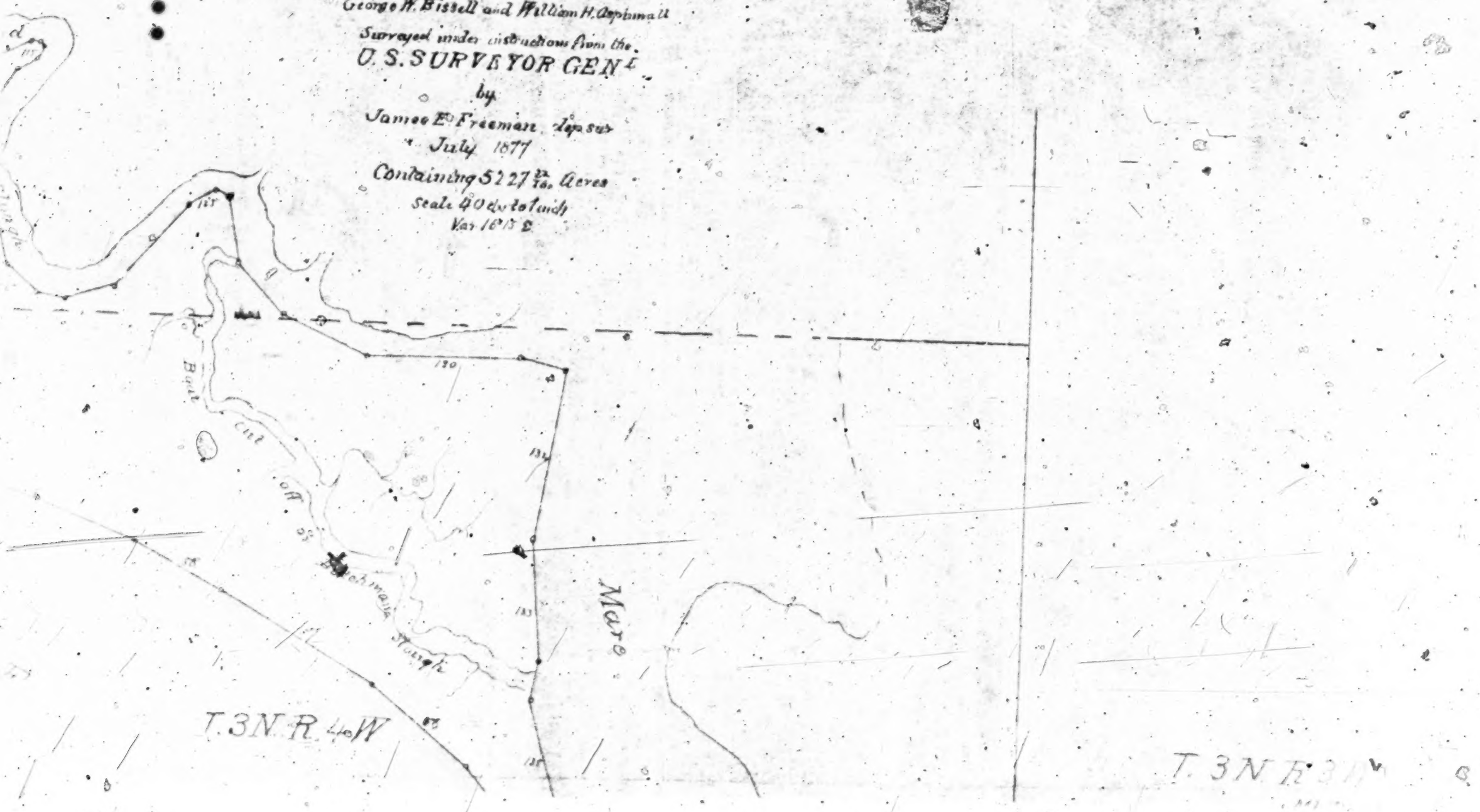
James E. Freeman, dep. sur.

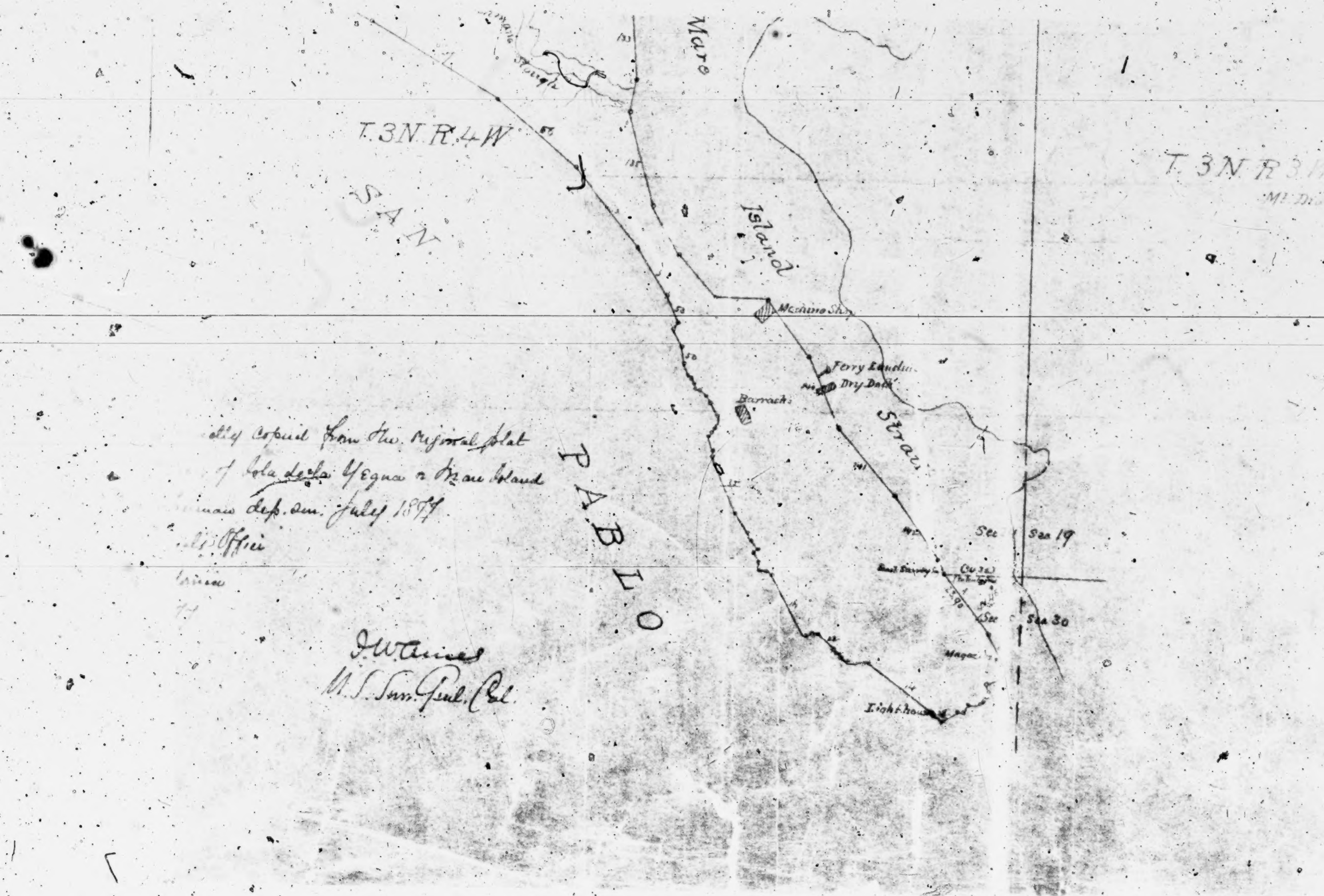
July 1877

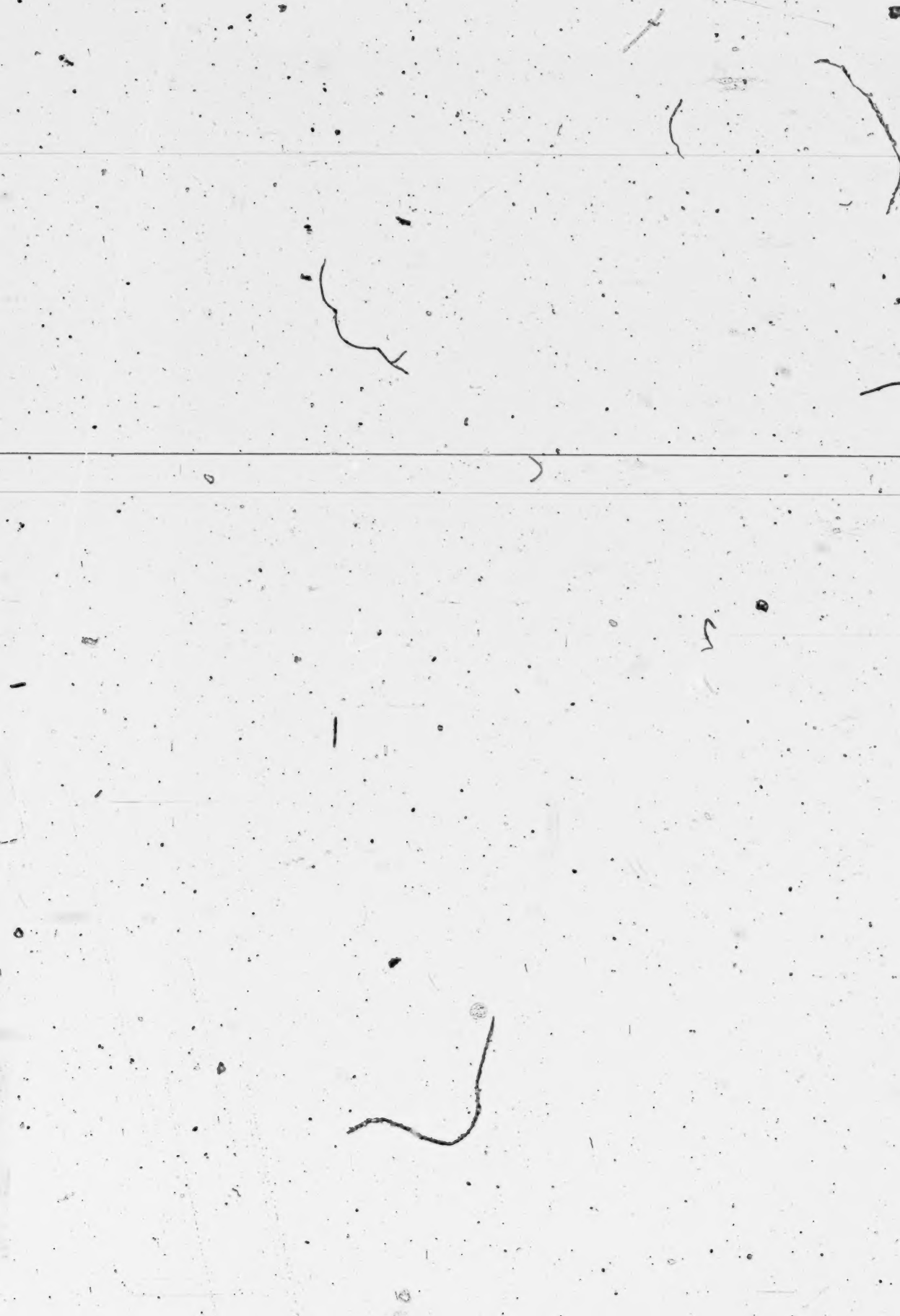
Containing 5227 22/100 Acres

Scale 40 chs to 1 inch

Var 16° 15' E




T. 3 N. R. 4 W
T. 3 N. R. 3 W
SAN
PABLO
Island
Strait
Mare
Barracks
Dry Dock
Sec 19
Sec 30
Lighthouse
...lly copied from the original plat
... of Isla de la Yegua or Mare Island
...man dep. sur. July 1877
...ls Office
J. W. Ames
U. S. Surv. Genl. Cal.



J. W. Ames, U. S. Surveyor General — J. Robinson, Chief Clerk

U. S. SURVEYOR-GENERAL'S OFFICE
CALIFORNIA

Commercial St., above Montgomery
(Up Stairs)

Official letters, etc., pertaining to the business of the office, should be addressed to the "U. S. Surveyor-General's Office, Post Office Box No. 2260." Be particular to describe the land you write about, by Section or parts of Section, Township and Range.

San Francisco, Nov. 5th, 1877.

Hon. J. A. Williamson,
Comr. Gen'l Land Office,
Washington, D. C.

Sir:

I have the honor to transmit herewith, tracing for account, also account of Jas. E. Freeman, Dep. Surveyor for surveying Isla de la Gegua or Mare Island (confirmed to Geo. W. Bissell and Wm. H. Aspinwall) executed under his contract of June 28, 1876, amounting to $404.94 payable from the appropriation for the survey of Private Land Claims in Cala. during the fiscal year ending June 30, 1876.

Very respectfully,

J. W. AMES,
U. S. Sur. Gen'l for Cala.

M
No. 99960

J. W. AMES,
U. S. Surveyor-General for California
Date, Nov. 5th, 1877

SUBJECT:

Transmitting tracing for account, also acct. of Jas. E. Freeman for surveying Isla de la Gegua or Mare Island, amounting to $404.94 payable from appropriation for the survey of Private Land Claims, during the fiscal year ending June 30, 1876.

Ans. Nov. 16, 1877.
Referred to Division E
Received (G. L. O.) Nov. 14, 1877.

J. W. D.

Department of the Interior
General Land Office
Washington, D. C., Nov. 16, 1877.

J. W. Ames, Esq.,
U. S. Surveyor General,
San Francisco, Cala.

Sir:

The surveying account of Jas. E. Freeman, amounting to the sum of $404.94/100 received with your letter of the 5" inst. is transmitted to the

Treasury for payment on this day, with request that draft be sent to payee in care of your office.

Very respectfully,

J. A. WILLIAMSON,

Commissioner.

U. S. SURVEYOR GENERAL'S OFFICE

San Francisco, January 18, 1878.

I HEREBY CERTIFY, that by virtue of the provisions of the Act of Congress, approved 1st July, 1864, entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California," notice of the plat and survey having been made of the rancho Isla de la Yegua, or Mare Island, finally confirmed to George W. Bissell & Wm. H. Aspinwall, surveyed by Jas. E. Freeman, U. S. Deputy Surveyor, in July, 1877, has been advertised in accordance therewith in two newspapers, to-wit: the Vallejo Evening Chronicle published in the County of Solano, State of California, being near to where the said land is located; the first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877; also in the Alta California a newspaper published in the City and County of San Francisco, State aforesaid; the first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877. And that the plat of said survey was retained in this office subject to inspec-

tion during all of ninety days, and until the expiration thereof from the date of the first publication.

In Testimony Whereof, I have hereunto signed my name officially, and caused my seal of office to be affixed in the City of San Francisco, this 18th day of January, 1878.

[Seal] I. W. AMES,
U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE

San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing is a full, true and correct copy of the original record of publication in the case of the survey of Mare Island as the same appears of record and on file in this office.

Attest: THEO. WAGNER,
U. S. Sur. Gen'l.

O. 38.856. E. 5
MARE ISLAND
Copy Record of
Advertisement.

T. 4 N. R. 5 W.

T. 4 N., R. 4 W.

151

Mizzle Nape Slough

Hitchita Slough

Yard

Marsh

Slough

Ortberry

B A Y

O K

T. 3 N., R.

Boundaries T. 3 N. R. 5 W

N°	Course	Dist.	N°	Course	Dist.	N°	Course	Dist.	N°	Course	Dist.
1	S. 46° E.	[illegible]	37	[illegible]	5.40	73	N. 63½ E.	[illegible]	109	N. 63½ E.	9.00
2	S. 27° E.	15.00	38	N. 30° E.	3.20	74	N. 87½ E.	23.00	110	N. 60½ E.	6.88
3	S. 40½ E.	3.50	39	N. 9½ E.	2.20	75	N. 87° E.	4.00	111	S. 63¾ E.	13.76
4	S. 36½ W.	3.50	40	N. 11° E.	5.40	76	East	[illegible]	112	N. 64½ E.	12.60
5	S. 69° W.	7.50	41	N. 3° W.	6.00	77	S. 79½ E.	[illegible]	113	N. 82° E.	3.18
6	S. 16° E.	[illegible]	42	N. 46° W.	4.00	78	S. 85½ E.	10.70	114	S. 28¾ E.	[illegible]
7	S. [illegible] W.	[illegible]	43	N. 50½ W.	3.30	79	N. 75° E.	9.50	115	S. 23¾ W.	4.07
8	S. [illegible] W.	2.80	44	N. 83½ W.	2.00	80	N. 60½ E.	18.00	116	S. 61¾ W.	8.90
9	S. 73° W.	1.60	45	N. 15° W.	2.70	81	S. 16° E.	2.30	117	S. 35¼ W.	28.13
10	S. 86½ W.	5.00	46	N. 43° W.	1.90	82	S. 1½ W.	7.00	118	S. 10¼ W.	9.60
11	S. 30° W.	4.00	47	N. ¼ W.	1.70	83	S. 5° W.	11.70	119	S. 33° E.	23.30
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
13	S. 62° W.	8.00	49	N. 18½ W.	5.60	85	S. 37° E.	7.00	121	S. 51½ E.	14.36
14	N. 84° W.	10.00	50	N. 10° W.	7.00	86	S. 79½ E.	4.00	122	S. [illegible] E.	19.51
15	S. 60° W.	2.30	51	N. 34½ W.	7.00	87	East	6.70	123	N. [illegible] E.	17.90
[illegible]	S. 86½ W.	[illegible]	52	N. 9° E.	4.20	88	N. 41° E.	4.00	124	N. 43½ E.	39.50
[illegible]	[illegible]	[illegible]	53	N. 22° W.	2.00	89	N. 55½ E.	12.00	125	N. 60½ E.	17.92
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	4.00

T.4N., R.4W.

PLAT

of

ISLA DE LAYEGUA OR MARE ISLAND

Finally confirmed to

George W. Bissell and William H. Aspinwall

Surveyed under instructions from the

U.S. SURVEYOR GEN.L

by

James E. Freeman, dep. sur.

July 1877

Containing 5227 82/100 Acres

Scale 4 Chs to 1 inch

Var. 16 15 E.

Yard

Slough

Mare

T.3N., R.4W.

	S	0	W			52	N	9	E	4.[illegible]	38	N [illegible]	E	8.00	34	N 43½	E	29.50
			W		80	53	N	22	W	2.00	89	N 35½	E	12.00	125	N 40½	E	11.92
	N	0	W		70	54	N	34	W	24.00	90	N 22	E	12.50	24	S 73	E	4.37
	N	13	W		50	25	N	40	W	44.00	91	N 3½	E	26.00	737	S 9	E	23.65
	N	67	W		00	56	N	52	W	44.00	92	N 10	W	22.00	188	S 46¾	E	23.78
	N	40	W		04	57	N	61	W	64.00	93	N 58½	E	5.00	29	S 05½	E	34.00
	N	4	W		10	58	N	64	W	36.00	94	S 65½	E	20.00	180	N 89	E	56.58
	N	77	W		2	50	59	N	71	W	196.00	95	S 78	E	4.00	13	S 78	E	17.70
	S		W		2	50	60	N	61	W	80.00	96	N 87½	E	11.10	132	S 9½	W	60.00
	N	43	W		4	00	61	N	62	W	15.00	97	S 61	E	7.50	191	S 41	E	42.70
	N	31	W		2	90	62	N	58½	W	25.00	98	S 52	E	4.40	150	S 13½	W	13.80
	N	60	W		3	20	63	N	67	W	12.50	99	S 31½	E	5.50	139	S 16½	E	40.50
	S	77	W		2	90	64	N	86	W	4.00	100	S 5	W	9.40	136	S 31½	E	22.11
	N	5	W		4	50	65	N	50	W	7.50	101	S 49½	W	11.00	187	S 42½	E	24.60
	N	23	W		4	30	66	N	79	W	18.00	102	S 6	W	11.00	138	E [illegible]		28.21
	N	31	E		1	20	67	N	55	W	5.00	103	S 30½	E	9.50	139	S 40½	E	26.50
	N	39	W		4	70	68	N	01	W	23.00	104	S 74½	E	14.00	140	S 24½	E	38.15
	N	25	W		3	30	69	N	67	W	10.00	105	E [illegible]		1.00	41	S 42	E	37.62
	N	32	W		[illegible]			N	62	W	48.00	106	N 58½	E	1.50	42	S 38	E	33.46
	N	25	W		20	70	71	N	23	W	8.00	107	N 23½	W	11.00	43	S 58	E	6.45
	N	49	E		2	00	72	N	26¾	E	4.50	108	S [illegible]	E	1.50				

S-1.1.

I hereby certify that in conformity with the provisions of the Revised Statutes of the United States, and the Instructions of the Commissioner of the General Land Office, dated December 31st 1864 this Survey and Plat of Township No. 4 North of Range No. 1 West of the Mount Diablo Meridian, published in the "Daily Evening Herald" published at Benicia in the County of Solano, for four weeks from the date of the first publication hereof, being the 11th day of October 1877; also in the "Daily Alta California" published in the City and County of San Francisco, for four weeks from the date of the first publication hereof, being the 11th day of October 1877 and the Plat thereof filed in this Office, subject to inches for a period of thirty days from the date of the first publication hereof.

U. S. Surveyor General's Office
San Francisco, California
August 6th 1879

Thos H. McBride
U. S. Surveyor General

I hereby certify that the foregoing is a true and correct copy of the original plat of the Survey of the Township and Range above described, as the same appears of record and on file in this Office.

U. S. Surveyor General's Office
San Francisco, Cal. Aug 6th 1879

Thos H. McBride
Surveyor General

SAN

PABLO

Island

Ferry Landing

Dry Dock

Barracks

Straits

Sec 24 Sec 19

Sec 25 Sec 30

that in conformity with the provisions of the Act
approved July 1st 1864 this survey and plat were
the "Valley's Evening Chronicle" published in the
and, for four weeks the date of the first pub-
lishing the 11th of October 1877: also in the
" published in the City and County of
ss, for four weeks the date of the first
thereof being the 4th of October 1877. This
ed in this Office, subject to inspection,
ty days from the date of the first publication
n General's Office
ies California
e 1879

Thos Wagner

U. S. Surv. Genl Cal.

E. P. H. S.

In Reply Address the Secretary of the Navy
and Refer to No. 445-5

NAVY DEPARTMENT,

Washington, September 9, 1905.

Sir:

This Department is in receipt of reports from the navy yard, Mare Island, stating that in connection with the suit instituted by E. H. Sawyer questioning the Government's ownership of certain lands heretofore regarded as lying within the limits of the yard named, it is desired definitely to ascertain the position of certain section lines which ought to be extended in order to determine the limits of the property in controversy.

From a letter addressed by the Surveyor General for California to the Civil Engineer at the navy yard, Mare Island, under date of August 12, 1905, copy herewith enclosed marked A, it appears that the "public lines referred to" (T. 3. N. R. 4 W.—M. D. M.) have never been surveyed by the Government. See also in this connection two blue prints showing tide land survey No. 34, likewise transmitted (marked, respectively, B and C).

Further information respecting the necessity for the survey of these lands is set forth in a letter, dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., (original marked D).

It is requested that if such action can appropriately be taken, instructions be issued to the Surveyor General of the State of California directing the survey of the lands referred to at the earliest date practicable.

I have the honor to be, Sir,

Very respectfully,

CHAS. H. DARLING,

Acting Secretary.

SWBD

The Secretary of the Interior.

2996

Navy, Secy. Acting

Sept. 9, 1905.

Refers to suit instituted by E. H. Sawyer, and asks that Surveyor General of California be directed to survey at earliest practicable date, described lands heretofore regarded as being within the limits of Mare Island Navy Yard, California.

(4 enclosures)

J. S. P.

Department of the Interior,

September 13, 1905.

Respectfully referred to the Commissioner of the General Land Office with instructions to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department of the action taken.

THOS. RYAN,
Act. Secretary.

U. S. General Land Office, Received Sep 15 1905
144650

1905—114650.

E. H. J. G.
J. H. B. J. W. W. W. H. C.

DEPARTMENT OF THE INTERIOR
General Land Office,

Address only the
Commissioner of the General Land Office.

Washington, D. C., September 22, 1905.

Subject:—Relative to instructing the U. S. Surveyor General to survey lands within the limits of the Mare Island Navy Yard, California.

The Honorable,

The Secretary of the Interior.

Sir:—

I am in receipt, by your reference of September 13, 1905, of a letter dated September 9, 1905, from the Acting Secretary of the Navy, addressed to you, inclosing a letter dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., addressed to the Commandant, Navy Yard, Mare Island, California, recommending that the Secretary of the Interior authorize the U. S. Surveyor General of California to survey certain section lines in Township 3 North, R. 4 W., M. D. M., California, within the limits of the Mare Island Navy Yard, embracing "Tide Land Survey No. 34", and inclosing two blue prints showing in red the approximate location of the land included in said Tide Land Survey No. 34, and a letter from the U. S. Surveyor General of California, dated August 12, 1905, in reply to his communication of August 10, 1905, in which the Surveyor General states that only a small portion "of the public land lines in T. 3 N., R. 4 N., M. D. M., required for your purpose" have been surveyed by the Government, and that:

"The section lines referred to in Tide Land Survey No. 34, Solano County, are projections from the lines and corners described in the above mentioned field notes, surveyed, if ever by the surveyor making said Tide Land Survey."

In a letter from Mr. Rousseau, above described, reference is made to a suit instituted by E. H. Sawyer in the case of Sawyer vs. McCalla, which is expected to come to trial in November, and which he states is being brought against the United States by Sawyer, "who questions the Government ownership to Tide Land Survey No. 34, Solano County, and accretions" lying to the North of the Steam Engineering Buildings, and comprising about 375 acres, which the U. S. Attorney desires to have definitely established; that said Tide Land Survey No. 34 is located and bounded with reference to certain section lines which it becomes necessary to definitely and accurately establish, and it is of considerable importance to the U. S. Attorney, in his defence of said suit,

"that the section lines referred to in Tide Land Survey No. 34, Solano County, should be projected as soon as possible", and referring to said blue prints, he calls attention to three corners of the SE¼ of Sec. 10, T. 3 N., R. 4 W., M. D. M., which, he states, "it is desirable to have located in the usual manner prescribed by law, by the Department of the Interior".

The Acting Secretary of the Navy, in his said letter dated September 9, 1905, addressed to you, requests that if such action can be appropriately taken, instructions be issued to the Surveyor General directing the survey of the lands, at the earliest date practicable.

In your note of reference, you direct this office to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department in the matter.

I have, therefore, the honor to report that the official plats of Ts. 3 and 4 N., R. 4 W., M. D. M., California, show that Mare Island is unsurveyed, and the records show that said island was claimed before the California Land Commission, established by Act of Congress approved March 3, 1851, (9 Stat., 631), by George W. P. Bissell and Wm. H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, he having received a grant to the land by Juan B. Alvarado, May 20, 1841, and it was confirmed to them, (Bissell and Aspinwall), by the Commission, May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

"The place of which confirmation is hereby given is situate in the Bay of San Francisco, and is called 'Isla de la Yegua', or Mare Island, and, being an island, is bounded by the water's edge".

The affirmatory decree of the United States District Court is not in this office, and under date of August 7, 1879, the U. S. Surveyor General, in his letter to this office in reply to letter from this office to him, dated July 25, 1879, stated that:

"Although it appears from the records of the court that a decree of confirmation was ordered to

be entered on the 2nd. day of March, 1857, no such decree can be found",

The Surveyor General at that time also transmitted a plat and field notes of the survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864, (13 Stat., 332), showing the area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of Confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his, (the U. S. Surveyor's General's), office, July 14, 1879, by Bernard F. Hanley, of Washington, D. C., "as attorneys for owners".

With reference to the survey as executed by James E. Freeman in 1877, the Surveyor General in his letter dated August 7, 1879, states as follows:

"I consider the survey incorrect in that, it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained South of a line run across the island from the vicinity of Station No. 54 to Station No. 138".

Copies of said letter, dated August 7, 1879, from the U. S. Surveyor General and its enclosures, above referred to, were forwarded with letter "E" from this office, addressed to you, dated August 3,

1900, in reply to a letter from the Secretary of the Navy dated July 23, 1900, addressed to you.

The records in this office further show that prior to confirmation of the island to Bissell and Aspinwall, the President by his order, dated November 6, 1850, reserved said island for public purposes, and on February 9, 1853, the Secretary of the Navy addressed a letter to the President, recommending the reservation as a site for a navy yard and naval depot, of Mare Island, describing the land to be reserved, as follows:

"The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island and harbors, waters and anchorages connected therewith, and necessary to the use of the same".

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

"The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservations may be legally recorded".

In addition to the foregoing, it is shown that, in reply to a letter from this office dated July 26, 1879, the Secretary of the Navy, under date of August 4, 1879, transmitted a copy of deed dated January 4, 1853, from George W. P. Bissell, Wm.

H. Aspinwall, and Mary S. McArthur, to the United States, for the island, in consideration of the sum of $83,491, "to them paid in proportion to their said interests, respectively", and the land is described in copy of deed as follows:

"All that tract of land and island known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and marsh belonging to the same, or which has ever been reported or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging, (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof".

Attached to this copy of said deed is also a copy of the opinion of the Solicitor of the Navy Department, dated October 20, 1873, addressed to "Commo. C. R. P. Rogers, Chief of Bureau &c", in which it is stated as follows:

"During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.

The decision of the Board of Commissioners of the U. S., under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now hold.

If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay".

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter: "See letter from the Secretary of the Navy, dated August 4, 1879", and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell, Aspinwall and McArthur, which survey was deemed sufficient for the purpose of conveying the land.

In view of the foregoing, I am of the opinion that this office has no authority to survey any land in the locality described, for the reason that it is not public land of the United States, the same having been purchased by the United States from the private land claimants aforesaid who derived their title from the Government of Mexico, as stated; and there is no appropriation available out of which

the expense of surveying other than public lands of the United States and reservations or abandoned reservations, under the jurisdiction of this office, could be paid.

If any further survey of the land is desired, I respectfully submit that it should be executed under the direction of the Navy Department under whose jurisdiction the land now appears to be.

The papers transmitted by you are returned herewith.

Very respectfully,

W. A. RICHARDS,

WHW. Commissioner.

2996

General Land Office

September 22, 1905.

Commissioner

Acknowledges receipt by Department reference of Sept. 13, 1905 of a letter dated August 19, 1905 from H. H. Rousseau, Civil Engineer, U. S. N., transmitted with letter dated Sept. 9, 1905 from the Acting Secretary of the Navy requesting that certain surveys within the limits of Mare Island Navy Yard, Cala., be made under the direction of this office. Reports in matter, in duplicate, and returns papers as directed.

Letter to Secy. of the Navy

Sept. 28/05

2996-1905 A.M.
L. & R. R. Div.

September 28, 1905.

The Secretary of the Navy.

Sir:

In a letter of the 9th instant to the Department the Acting Secretary of the Navy stated that, in connection with the suit instituted by E. H. Sawyer questioning the ownership by the Government of certain lands heretofore regarded as lying within the limits of the United States Navy Yard, Mare Island, California, it is desired to ascertain definitely the position of certain section lines which ought to be extended to determine the limits of the property in controversy.

With this end in view he requested that, if such action can be appropriately taken, instructions be issued directing the early survey of the lands.

The letter, with its enclosures, was referred to the Commissioner of the General Land Office with instructions to take action as requested and report in the premises to the Department.

In answer to the letter I have the honor to enclose a copy of the report thereon by the Commissioner under date of the 22nd instant.

The report sets forth the facts shown by the records of the General Land Office relating to the acquisition of Mare Island by the United States by purchase of the entire area thereof, based on the survey executed by the Board of Officers of the

United States, sent to California presumably by the Navy Department.

In view of the facts covered by the report, the Commissioner has expressed the opinion that his office has no authority to survey any land in the locality described, as it is not public land of the United States.

I concur in the report of the Commissioner and return herewith the enclosures in the letter of the Acting Secretary of the Navy.

Very respectfully,

THOS. RYAN,

Acting Secretary.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit Q. Filed June 9, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

U. S. EXHIBIT "X"

Corrected Report of Spanish and Mexican Grants in California,

Complete to February 25, 1886.

Prepared by

STATE SURVEYOR-GENERAL

Published as Supplement to Official Report of 1883-84.

276	Laguna Seca	C. M. de Munras	2,179.50	Patented November 24, 1865	Monterey.
196	Laguna Seca	L. C. Bull et al.	19,972.92	Patented November 24, 1865	Santa Clara.
16	Larkin's Children's Ranch	F. Larkin et al.	44,364.22	Patented December 18, 1857	Colusa.
289	Laureles, Los	J. M. & J. de M. Boronda	6,624.99	Patented August 9, 1866	Monterey.
285	Laureles, Los	L. Ransom	718.23	Patented April 18, 1871	Monterey.
347	Liebre, La	J. M. Flores	48,799.59	Patented June 21, 1875	Kern and Los Angeles.
266	Llano de Buena Vista	D. Spence	8,446.23	Patented January 4, 1860	Monterey.
12	Llano Seco	C. J. Brenham et al.	17,767.17	Patented June 18, 1860	Butte.
64	Llano de Santa Rosa	J. Carrillo	13,316.03	Patented November 27, 1865	Sonoma.
230	Llano del Tequesquite	V. Sanchez et al.	16,016.30	Patented December 29, 1871	San Benito.
81	Locoallomi	Heirs of Julian Popé, dec'd	8,872.79	Patented March 17, 1862	Napa.
366	Lomas de la Purificacion	Augustin Janseus	13,341.38	Patented April 18, 1871	Santa Barbara.
499	Lomas de Santiago	Theodocio Yorba	47,226.61	Patented February 1, 1868	Los Angeles.
239	Lomerias Muertas	V. Sanchez et al.	6,659.91	Patented August 9, 1866	San Benito.
374	Lompoc	J. & J. A. Carrillo	42,085.44	Patented November 3, 1873	Santa Barbara.
427	Los Angeles City Lands	City of Los Angeles	17,172.37	Pat'd Aug. 4, '75, and Aug. 9, '66	Los Angeles.
	Los Angeles County, lot near San Pedro, in	Temple & Alexander	1,771.77	Before Surveyor-General	Los Angeles.
60	Mallacomes or Moristal	Cook & Ingalls	2,559.94	Patented February 18, 1859	Sonoma.
61	Mallacomes or Moristal y Plan de Agua Caliente, part of	J. S. Berreyesa	17,742.72	Patented July 10, 1873	Sonoma and Napa.
	Mare Island	G. W. P. Bissell et al.	5,527.22	Final decree not entered	Solano.
104	Mariposas, Las	J. C. Fremont	44,386.83	Patented February 19, 1856	Mariposa.
111	Medanos, Los	J. D. Stevenson	8,858.83	Patented October 8, 1872	Contra Costa.
110	Meganos, Los	Alice Marsh	13,316.00	Patented August 19, 1867	Contra Costa.
443	Merced, La	F. P. F. Temple et al.	2,363.75	Patented February 13, 1872	Los Angeles.
212	Mesa de Ojo de Agua	T. W. Russell	54.36	Not approved by Com. G. L. O.	Santa Cruz.
138	Milpitas	Heirs of J. M. Alviso	4,457.66	Patented June 30, 1871	Santa Clara.
307	Milpitas	Ygnacio Pastor	43,280.90	Patented February 18, 1875	Monterey.
281	Mission Carmelo	Bishop J. S. Alemany	9.00	Patented October 19, 1859	Monterey.
	Mission Dolores, lot in	Candelario Valencia	1.78	Patented December 16, 1882	San Francisco.
	Mission Dolores, lot in	Elizabeth de Zaldo	.45	Sent up for Patent Aug. 26, 1882	San Francisco.
161	Mission Dolores, two tracts at	Bishop J. S. Alemany	8.54	Patented March 3, 1858	San Francisco.
156	Mission Dolores, lot in	F. DeHaro	2.04	Before Surveyor-General	San Francisco.
157	Mission Dolores, lot in	F. DeHaro	.44	Sent up for Patent Aug. 21, 1885	San Francisco.
	Mission Dolores, lot in	E. & J. R. Valencia	.50	Rejected	San Francisco.
160	Mission Dolores, suerte in	Heirs of F. G. Palomares	28.41	Patented April 1, 1870	San Francisco.
158	Mission Dolores, suerte in	C. S. de Bernal et al.	5.86	Patented June 13, 1882	San Francisco.
372	Mission la Purisima	J. R. Malo	14,735.76	Patented October 12, 1882	Santa Barbara.
373	Mission Purisima de la	Bishop J. S. Alemany	14.04	Patented January 24, 1874	Santa Barbara
308	Mission San Antonio	Bishop J. S. Alemany	33.19	Patented May 31, 1862	Monterey.
392	Mission San Buenaventura	Bishop J. S. Alemany	36.27	Patented May 23, 1862	Ventura.
393	Mission San Buenaventura, lot in	Fernando Tico	28.90	Patented June 9, 1866	Ventura.
396	Mission (Ex) San Buenaventura	M. A. R. de Poli	48,822.91	Patented August 24, 1874	Ventura.
533	Mission San Diego	Bishop J. S. Alemany	22.21	Patented May 23, 1862	San Diego.

U. S. EXHIBIT "Z"

Navy Yard, Mare Island,
Saturday, November 15th 1878

Part "First"

Weather Clear and pleasant wind light North.

Part "Second"

Clear and pleasant wind light from East. The Schooner "George Woods" Capt. W. Elliott arrived from San Francisco at 8 a.m. with 400 Barrels of Lime for Y & D. The Jamestown Steam Launch left the Yard at 9 a.m. with Lumber & carpenters to finish house on tulies. Also Carpenters and Material was sent up on the Tirlies about a mile above the Foundry on the San Pablo Bay Side to build a Government House on Land claimed by the Government. The Ship "Coquimbo" Capt. C. Eyer arrived from San Francisco at 10.30 a.m. with Piles & Timber for Y. & D.

Part "Third"

Clear and Cool wind light from East. The Jamestown Steam Launch arrived from the upper tulies at 4 P.M. All work being finished, the Schr. "George Woods" sailed at 4:30 P.M. The Steamer Pilot landed freight for the Yard, pumping out cofferdam today.

(Marginal note): James Tilton, Charles Schafer, Michael McNamara, Watchmen are occupying the

new building on the Tulies above the Foundry. John Charlton Watchman is occupying the new building on Sonoma Creek.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit Z. Filed June 15, '37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 5

United States of America. State of California. To all to whom these presents shall come greeting. Whereas, under the provisions of an act of Congress of the United States, approved the twenty-eighth day of September A. D. one thousand eight hundred and fifty, entitled "An Act to enable the State of Arkansas, and other states to reclaim Swamp Lands within their limits" in which Act the manner of selecting and setting apart Swamp and Overflowed Lands is fully set forth. And Whereas the Legislature of the State of California has provided for the sale and conveyance of said lands by Statutes enacted from time to time, And Whereas, It appears by the certificate of the Register of the State Land Office Number 1413, bearing date March 18th A. D. one thousand Eight Hundred and Seventy-four, and issued in accordance with the provisions of law, that the tracts of Swamp and Overflowed Lands hereinafter described have been duly and properly surveyed in accordance with law, that full payment has been made to the State for the same and that John W. Pearson, Assignee of Jacob C. Hinckley is entitled to receive a Patent therefor, said lands being situated in Solano County and described as follows, to-wit: Survey No. 569, Swamp and Overflowed Lands, Solano County, Townships No. 3 and 4 North Ranges No's. 4 and 5 West, Mount Diablo Meridian. Sections No's 4 and 5 and portions of Sections 3, 6, 7, 8, 9,

10 and 15, T. 3 N. R. 4 W. Portions of Sections 1 and 2, T. 3 N. R. 5 W. Sections 31, 32, 33 and portions of Section 34, T. 4 N. R. 4 W. Section 36, and portions Section 26, 27, 34 and 35, T. 4 N. R. 5 W. and more particularly described in the field notes of said Survey as follows. Beginning at a stake on the West bank of Napa Bay, 72.00 chns West of the Northeast corner of Section Thirty-four (34), Township Four (4) North Range Four (4) West Mount Diablo Meridian, running thence West on Section lines 328.00 chns to a stake on the South bank of Huichica Creek at the Northeast corner of Section thirty-five (35), T. 4 N. R. 5 W. thence with said bank as follows, N. 83¾° W. 35.00 chns, N. 75° W. 42.50 chns, S. 80¼° W. 39.00 chns, S. 60° W. 17.50 chains to Section line, S. 55° W. 11.50 chns, S. 22° W. 13.50 chns to the County line, S. 4° W. 10.70 chns to San Pablo Bay, S. 44¾° E. 15.10 chns, S 67° E. 38.10 chns, S 75° E. 42.80 chns, S. 61° E. 76.30 chns, S. 63¾° E. 42.80 chns, S. 69° 10′ E. 61.00 chns, S. 67° 40′ E. 63.87 chns, S. 68¼° E. 57.20 chns, S. 65° 20′ E. 45.20 chns, S 66¼° E. 68.00 chns, S. 80° E. 40.50 chns, to the West line of Swamp land survey no. 34. Thence North along said line 22.33 chains to a point 20.00 chns South of the centre of Section Ten (10) T. 3 N. R. 4 W. thence East along the North line of said Survey, 30.00 chns to the bank of Napa Bay, thence along said bank, N. 12¾° W. 20.30 chns to the mouth of Dutchmans Slough N. 2½° W. 85.00 chns to the South Slough, N. 34½° W. 12.00 chns, N. 75° W.

17.00 chns, N. 25° W. 43.00 chns, N. 12½° W. 63.50 chns to the place of beginning and containing Seven thousand four hundred and thirteen 48/100 (7413.48) acres. Survey run by the true Meridian, Magnetic Variation 16° 25′ East.

Now Therefore, All the requirements of the Act of Congress, as well as the Acts of the Legislature, in relation to Swamp and Overflowed Lands having been fully complied with I, Newton Booth, Governor of the State of California, by virtue of Authority in me vested have granted, bargained, sold and conveyed, and by these presents, do grant, bargain, sell and convey unto John W. Pearson, all the above described lands. With the appurtenances thereunto belonging, to have and to hold, unto him the said John W. Pearson, his heirs and assigns forever.

In Testimony Whereof I, Newton Booth, Governor of the State of California have caused these Letters to be made Patent, and the Seal of the State of California to be hereunto affixed.

Given under my hand, at the City of Sacramento, this the Seventh day of April in the year of our Lord One thousand Eight Hundred and Seventy-four.

[Seal] NEWTON BOOTH
Governor of State.

Attest: DRURY MELONE
Secretary of State.

Countersigned: ROBERT GARDNER
Register of State Land Office.

I certify the foregoing to be a true copy of Patent recorded at the request of Wells Fargo & Co. May 1st A. D. 1874, at 8 o'clock, A. M.

E. F. GILLESPIE

Co. Recorder.

[Endorsed]: U. S. District Court S F. U. S. vs. Stewart, No. 2685. Deft. Exhibit 5. Fld. June 11, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 6

No. 72 98277.

THE UNITED STATES OF AMERICA

To All to Whom These Presents Shall Come, Greeting:

Whereas, by the act of Congress approved September 28, 1850, entitled "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits", it is provided that all the "Swamp and Overflowed Lands," made unfit thereby for cultivation, within the State of California which remained unsold at the passage of said act, shall be granted to said State.

And Whereas, in pursuance of instructions from the General Land Office of the United States the several tracts or parcels of land hereinafter described have been selected as "Swamp and Overflowed Lands" inuring to the said State under the act aforesaid, situate in the District of Lands subject to sale at San Francisco, California, to wit: Mount Diablo Meridian Township Three (3) North of Range Five (5) West. All of fractional section One; the lots numbered one, two, three, four, five, six, seven, eight and nine and the east half of the southwest quarter of Section six; according to the Official plats of survey of the said lands returned to the General Land Office by the Surveyor General, and for which the Governor of the said State of California did on the twenty-first day of May One Thousand eight hundred and ninety-six, re-

quest a patent to be issued to the said State, as required in the aforesaid act.

Now, Therefore, Know Ye, That the United States of America, in consideration of the premises, and in conformity with the Act of Congress aforesaid, have given and granted, and by these presents do give and grant, unto the said State of California in fee simple, subject to the disposal of the Legislature thereof, the tracts of land above described.

To Have and to Hold the *the* same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said State of California, in fee simple and to its assigns forever.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to *ne* made patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifth day of June in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

By the President;

[Seal] GROVER CLEVELAND

By M. McKEAN,
Secretary.

L. Q. C. LAMAR,
Recorder of the General Land Office.

Recorded V. 1 P. 321.

No. 1554. State of Califoı ia, Office of the Surveyor General and Register State Land Office,

I, Hereby Certify, that the annexed document is a copy of that portion of Swamp Land Patent No. 72, issued by the United States to the State of California, June 5, 1896, embracing certain swamp lands in Sections 1 and 6, T. 3 N. R. 5 W., M.D.M., on file in my office; that said document has been compared by me with the original, and is a correct transcript therefrom. In Witness Whereof, I hereto set my hand and affix my Official seal, this 5th day of May A. D. 1920.

[Seal] W. S. KINGSBURY,
Surveyor General and Register State Land Office.

Filed for record at the request of California Pacific Title Ins. Co., May 22, A. D. 1920 at 35 minutes past 9 O'clock A. M.

F. M. DICKEY,
County Recorder.
By J. P. BYRNE,
Deputy Recorder.

[Endorsed]: U. S. District Court S F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 6. Fld. June 11, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 7

(Record of Patents.)
4-401 M-tyr.

109391

The United States of America,

To all to whom these presents shall come, Greeting:

No. 152.

Whereas, By the Act of Congress approved September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits," it is provided that all the "Swamp and Overflowed Lands," made unfit thereby for cultivation, within the State of California, which remained unsold at the passage of said Act, shall be granted to said State; and

Whereas, In pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described have been selected as "Swamp and Overflowed Lands," inuring to the said State under the Act aforesaid, situated in the District of Lands subject to sale at Oakland, California, to wit:

MOUNT DIABLO MERIDIAN—CALIFORNIA.

Township Four north, Range Five west.

The Lots one, two, and three of Section two; the Lots one, two, three, four, and five, the south half of the southeast quarter, and the southwest quarter of Section three; the Lots one, two, three, and four, the south half of the northeast quarter, the south

half of the northwest quarter, and the south half of Section four; the Lots one, two, three, four, five, and six, the southeast quarter of the northeast quarter, the southeast quarter, and the south half of the southwest quarter of Section five; the Lots one, two, three, four, five, six, and seven of Section six; the Lot one of Section seven; the east half, the east half of the northwest quarter, the northwest quarter of the northwest quarter, the east half of the southwest quarter, and the Lots one, two and three of Section eight; all of Section nine; all of Section ten; the Lot one, the west half of the northeast quarter, the southeast quarter of the northeast quarter, the northwest quarter, and the south half of Section eleven; the Lots one, two, three, and four, the south half of the northwest quarter, and the south half of Section twelve; all of Section thirteen; all of Section fourteen; all of Section fifteen; all of Section sixteen; the east half, the northeast quarter of the northwest quarter, and the Lots one, two, three, and four of Section seventeen; the Lot one of Section nineteen; the east half, the east half of the southwest quarter, and the Lots one, two, three, four, five, and six of Section twenty; all of Section twenty-one; all of Section twenty-two; all of Section twenty-three; all of Section twenty-four; all of Section twenty-five; all of Section twenty-six; all of Section twenty-seven; all of Section twenty-eight; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter, the Lot one, and the southwest quarter of Section twenty-nine; the Lots one, two, three, and

four, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of Section thirty; the Lots one, two, and three of Section thirty-one; the east half, the east half of the northwest quarter, the east half of the southwest quarter, the northwest quarter of the northwest quarter, and the Lots one, two, and three of Section thirty-two; the Lots one, two, and three, the west half of the northeast quarter, the northwest quarter, and the south half of Section thirty-three; the northeast quarter, the northeast quarter of the northwest quarter, and the Lots one, two, three, four, five, six, seven, eight, and nine of Section thirty-four; the north half, the northeast quarter of the southeast quarter, and the Lots one, two, three, and four of Section thirty-five; the north half, the southeast quarter, the east half of the southwest quarter, the northwest quarter of the southwest quarter, and the Lot one of Section thirty-six,—containing seventeen thousand sixty-four and forty hundredths acres, according to the Official Plat of Survey of the said lands, returned to the General Land Office by the Surveyor General, and for which the Governor of the said State of California did, on the twenty-eighth day of April, one thousand nine hundred nine, request a patent to be issued to the said State, as required in the aforesaid Act:

Now, Therefore, Know Ye, That the United States of America, in consideration of the premises, and in conformity with the Act of Congress afore-

said, Has Given and Granted, and by these presents Does Give and Grant, unto the said State of California, in fee simple, subject to the disposal of the Legislature thereof, the tracts of land above described; To Have and to Hold the same, together with all the rights, privileges, immunities, and appurtenances thereto belonging, unto the said State of California, in fee simple, and to its assigns forever.

In Testimony Whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the City of Washington, the Seventh day of February, in the year of our Lord one thousand nine hundred and Ten, and of the Independence of the United States the one hundred and Thirty-fourth.

By the President:

[Seal] WM. H. TAFT

By W. M. YOUNG,
Secretary.

H. W. SANFORD
Recorder of the General Land Office.

[Endorsed]: U. S. District Court S F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 7. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 8

4—1043.

The United States of America,

To All to Whom These Presents Shall Come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States, a list of Swamp and Overflowed Lands approved to the State of California, by the Secretary of the Interior, under Sections 2479, 2480, 2481 and 2488 of the Revised Statutes, to-wit:

Mount Diablo Meridian, California, Township three north of Range four West, The Lots three, four, five, six and seven of Section one; the Lots one, two, three, four, five and six of Section two; the Lots one, two, three, four, five, and six, the south half of the northwest quarter, and the southwest quarter of Section three, the Lots one, two, three, four, five, six, seven, eight, nine, ten, and eleven; the South half of the Northeast quarter; the Northwest quarter of the Northwest quarter; the Northeast quarter of the Southeast quarter and the West half of the Southwest quarter of Section four; the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve, the northwest quarter of the northeast quarter; the southwest quarter of the northwest quarter; the Northeast quarter, of the Southeast quarter, the south half of

the southeast quarter, and the northwest quarter of the southwest quarter of Section five; the Lots one, two, three, four, five and six; the northeast quarter, and the north half of the northwest quarter of section six; the Lots one, two, and three and the northeast quarter of the northeast quarter of section eight, the Lots one, two, three, four, five, six, seven and eight, the southwest quarter of the northeast quarter, the north half of the southeast quarter; the north half of the northwest quarter and the southeast quarter of the northwest quarter of Section nine; the Lots one, two, three, four, five, six, seven and eight; the north half of the northwest quarter, and the west half of the southwest quarter of Section ten, the Lots one and two of Section eleven, the Lots two, three, four and five of Section twelve, the Lot one of Section fifteen, and the Lot one of Section Sixteen. Township four north of Range four west.

The lot three of Section two, the Lots one, two, three, four, five, six and seven, the South half of the northeast quarter; the south half of the northwest quarter; the southeast quarter of the southeast quarter; the west half of the southeast quarter, and the east half of the southwest quarter of Section three; the Lots one, two, three, four, five, six, seven, eight and nine of Section four; the Lots one and two and the southeast quarter of the southeast quarter of Section five; the Lots one, two, three, four, five, six, seven, and eight; the South half of the Northeast quarter; the south half of the north-

west quarter; the southeast quarter and the east half of the southwest quarter of Section seven; the Lots one, two, three, four, five, six, seven, eight and nine; the northeast quarter of the northeast quarter, and the southwest quarter of the northwest quarter of Section eight, the Lots one, two, three, four, five, six, seven, eight, and nine, the east half of the northeast quarter, the west half of the northwest quarter, and the northeast quarter of the southeast quarter of Section nine, the Lots one, two, three, and four, the northeast quarter, the east half of the northwest quarter, and the northeast quarter of the southwest quarter of Section ten, the Lots one, two, three, and four, the east half of the northwest quarter, the east half of the southwest quarter, the southeast quarter of the southeast quarter, and the west half of the southeast quarter of Section fifteen, the Lots one, two, three, four, five, six and seven, the northeast quarter, the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section sixteen, the Lots one, two, three, four, five, six, seven, eight, nine, and ten of Section seventeen, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, the North half of the northeast quarter, the northeast quarter of the northwest quarter and the southwest quarter of the southwest quarter of Section eighteen, the Lots one, two, three, four, five, six, seven, and eight, the west half of the northeast quarter, the northwest quarter, the northwest quarter of the southeast quarter,

and the southwest quarter of Section Nineteen, the Lots one, two, three, four, five and six, the Northwest quarter of the northwest quarter, the south half of the northwest quarter, the northwest quarter of the southeast quarter, the south half of the southeast quarter, and the southwest quarter of Section twenty, the Lots one, two, three, four, five, six and seven of Section twenty one, the Lots one, two, three, four, five, six, seven, eight, and nine of Section twenty two, the Lots one, two, three, four, five, six, seven, and eight of Section twenty three, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve of Section twenty six, the Lots one, two, three, four, five, six, seven, and eight of Section twenty seven, the Lots one, two, three, four, five, six, seven and eight, the northeast quarter, the northeast quarter of the northwest quarter, the northeast quarter of the southeast quarter, the west half of the southeast quarter, and the southeast quarter of the southwest quarter of Section twenty eight, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen, the West half of the southeast quarter, and the north half of the southwest quarter of Section twenty nine, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen, the north half of the southeast quarter, and the east half of the southwest quarter of Section thirty, the Lots one, two, three, four, five, six, seven, eight and nine, the southwest quarter of the

northeast quarter, the south half of the northwest quarter, the southeast quarter of the southeast quarter, the west half of the southeast quarter, and the southwest quarter of Section thirty one, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen, the west half of the northeast quarter, the southeast quarter of the northwest quarter, and the northeast quarter of the southwest quarter of Section thirty two, the Lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen of Section thirty three, the Lots two, three and four of Section thirty four, and the Lots nine, ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen of Section thirty five, containing in the aggregate, thirteen thousand eight hundred seventeen acres and forty-four hundredths of an acre, according to the official plat of the said land on file in the General Land Office, and for which the Governor of the said State of California, did, on the twenty nineth day of March, one thousand nine hundred and twenty four, request a Patent to be issued to the said State.

Now Therefore, Know Ye, That the United States of America, in consideration of the premises has given and granted, and by these presents does give and grant, unto the said State of California, in fee simple, subject to the disposal of the Legislature thereof, the tracts of land above described,

To Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said State of California, in fee simple, and to its assigns forever.

In Testimony Whereof, I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land office to be hereunto affixed.

Given under my hand, in the District of Columbia, the twenty sixth day of April in the Year of our Lord one thousand nine hundred and twenty four and of the Independence of the United States the one hundred and forty eighth.

By the President:

[Seal] CALVIN COOLIDGE,

By VIOLA B. PUGH,

Secretary.

M. P. LeROY,

Recorder of the General Land Office.

Recorded: Patent Number 937055.

No. 1883. State of California, Office of the Surveyor General and Register State Land Office.

I Hereby Certify that the annexed document is a copy of Swamp Land Patent No. 214 issued to the State of California by the United States April 26, 1924, on file in my office; that said document has

been compared by me with the original and is a correct transcript therefrom.

In Witness Whereof, I hereto set my hand and affix my Official Seal, this twenty-ninth day of May, A. D. 1924.

[Seal] W. S. KINGSBURY,
Surveyor General and Register State Land Office.

Recorded at the request of Levinsky & Jones, June 7, A. D. 1924, at 15 minutes past 10 O'Clock A. M.

F. M. DICKEY,
County Recorder.
By J. P. BYRNE,
Deputy Recorder.

[Endorsed]: U. S. District Court S F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 8. Fld. June 11, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 20

U. S. Circuit Court—Dist. of California.

No. 3140.

San Francisco Savings Union

Plff.

vs.

John Irwin,

Deft.

Upon the request of S. G. Hilborn, District Attorney for California, Augustus L. Rhodes is hereby appointed a special assistant attorney of the United States for the District of California in the above entitled case.

August 16th, 1884.

[Name illegible]
Attorney General

[Endorsed]: Filed December 20, 1884. I. S. B. Sawyer, Clerk.

[Endorsed]: U. S. District Court S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 20. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 21

Department of Justice,

Washington, 20th September, 1886.

A. L. Rhodes, Esq.
Counsellor at Law
430 California Street,
San Francisco, Cal.

Sir:

You will please sue out a writ of error in the case of S. F. Savings Union et al. v. John Irwin, U. S. Circuit Court for the District of California.

A writ of error being to be sued out by direction of this Department, no bond will be necessary. (Vide §1001, Rev. Stat.)

As to the cost of making out the transcript to accompany the writ of error, the authority of this letter will be sufficient to entitle the Clerk of the said Court to his proper allowances.

Very Respectfully,
Your obedient servant,
W. A. JENKS
Acting Attorney General.

[Endorsed]: September 27, 1886.

[Endorsed]: U. S. District Court SF. U. S. vs. Stewart. No. 2685. Deft. Exhibit 21. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 22

Before the Board of Supervisors of Solano County, California.

In the Matter of the Application of Sears Point Toll-Road Company, a corporation, for authority to take the necessary land for and to construct a toll-road.

ORDER GRANTING APPLICATION TO TAKE THE NECESSARY LAND FOR AND TO CONSTRUCT TOLL-ROAD.

Sears Point Toll-Road Company, a corporation, having on the 1st day of March, 1926, at the hour of ten o'clock A.M. of said day presented to the Board of Supervisors of Solano County, California, its verified written petition, praying for authority to take the necessary land for and to construct the toll-road referred to in said petition and hereinafter described, and appointing two Commissioners to lay out said toll-road, to-wit: A macadamized turnpike toll-road leading westerly from the northerly end of Sims Avenue, Solano County, California, as said Sims Avenue is shown on the Map of "Bay Terrace", recorded in the office of the County Recorder of Solano County, March 12, 1920, to a point on the State Highway running through Sears Point, Sonoma County, California, located approximately 200 feet west of the Northwestern Pacific Railroad Station at Sears Point said road having

a total distance of ten miles, more or less, and having its easterly terminal in Solano County at the northerly end of said Sims Avenue and its westerly terminal in Solano County at a point on the western boundary line of Solano County made by the intersection of said boundary line with a line commencing at the following described point:

Beginning at the point of intersection of the northern boundary line of Solano County with the eastern boundary line of Sonoma county and running thence easterly along said northerly boundary line of Solano County 715 feet; thence at right angles southerly 62 feet to a point, which point is the point of commencement of said line. Said line runs from said point westerly and parallel to the northern Boundary line of Solano County 1400 feet to a point on Tubbs Island, located in Sonoma County, California.

and said petition having come on regularly for hearing on said 1st day of March before said Board of Supervisors at the hour of ten o'clock A.M. of said day, and it having been made to appear at said hearing, by the necessary affidavits presented to said Board and filed in the office of the Clerk thereof, that Sears Point Toll-Road Company had given notice of its intention to apply to said Board of Supervisors on the said 1st day of March, 1926 at the hour of ten o'clock A.M. of said day for said authority and the appointment of said Commis-

sioners and that said notice was given in the manner, form and for the time required by law, and

It further appearing that Sears Point Toll-Road Company has in all things complied with the law in making said application and in giving notice of the same, and

It further appearing to said Board of Supervisors that the public interests will be promoted by the construction of said toll-road, and

It further appearing that Sears Point Toll-Road Company is a proper and suitable corporation to which to grant the right and privilege applied for in said application, and

It further appearing that all of the allegations contained in said written application are true and that C. B. Butler and Frank Knight are two suitable persons, who are disinterested either in the said Sears Point Toll-Road Company or in any land sought to be taken by said company or adjoining thereto,

Now Therefore, It Is Hereby Ordered that said written application be and the same is hereby granted, and that said applicant, Sears Point Toll-Road Company, be and it is hereby authorized to take the real property in said County of Solano necessary for said toll-road, or any toll-road that may be laid out by the Commissioners appointed in accordance with law to lay out same,

It Is Further Ordered that C. B. Butler and Frank Knight be and they are hereby appointed

Commissioners to lay out that portion of said toll-road located or to be located in the said County of Solano.

The foregoing Order made and adopted at a regular meeting of this Board of Supervisors duly and regularly called and held on Monday, the 1st day of March, 1926, by the following vote on roll call.

Supervisor Mayfield
Supervisor McCormack
Supervisor Schmeiser
Supervisor Thornton
Supervisor Fleming

Ayes: 5; Noes: none; Absent or not voting: none.

Whereupon, the Chairman declared the foregoing Order duly made and adopted, and it was So Ordered.

Office of the Clerk of the Board of Supervisors,
County of Solano, State of California.

I, the undersigned, County Clerk of the County of Solano and ex-officio clerk of the Board of Supervisors in and for said county do hereby certify the within and foregoing Order of said Board of Supervisors to be a full, true and correct copy of the original Order made by said Board of Supervisors on the 1st day of March, 1926, at a regular meeting of said Board and that said Order is spread in full upon the minutes of said Board in book 12, page 79, of said minutes.

Witness my hand and the seal of said Board this ———day of March, 1926.

[Seal] G. G. HALLIDAY,
Clerk of the Board of Supervisors.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 22. Filed June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 23

Before the Board of Supervisors of the County of Solano, State of California

In the matter of the application of Sears Point Toll-Road Co., a corporation, for authority to take the necessary land and to construct a toll road along an altered route thereof in Solano County.

ORDER GRANTING APPLICATION TO TAKE THE NECESSARY LAND AND TO CONSTRUCT THE TOLL ROAD ALONG THE ALTERED ROUTE THEREOF.

Sears Point Toll-Road Co., a corporation, having on the 4th day of April, 1927, at the hour of 10 o'clock A.M. of said day, presented to the Board of Supervisors of the County of Solano, State of California, its verified written petition, praying for authority to take the necessary land and to construct the toll road referred to in said petition along the altered route thereof, and for the appointment of two commissioners to lay out the said toll road along the altered route thereof, and said petition having come on regularly for hearing on said 4th day of April, 1927, before said Board of Supervisors at the hour of 10 o'clock of said day, and it having been made to appear at said hearing by proper affidavits presented to said board and filed in the office of the Clerk thereof, that Sears

Point Toll-Road Co. had given notice, specifying the character of said road and termini and each town, city or village, (to-wit, none) through which it is proposed to construct said road, and the time when said application would be made, and that said notice was given in the manner and form and for the time required by law; and it further appearing that said Sears Point Toll-Road Co. has in all things complied with the law in making said application and in giving notice of the same; and it further appearing to said Board of Supervisors that the public interests will be promoted by the construction of said toll road along said altered route; and it further appearing that all the statements and allegations contained in said written application are true and that C. B. Butler and Frank Knight are two suitable persons who are disinterested either in the said Sears Point Toll-Road Co. or in any land sought to be taken by said corporation, or adjoining thereto.

Now, Therefore, It Is Hereby Ordered that said written application be and the same is hereby granted, and that said applicant, Sears Point Toll-Road Co., be and it is hereby authorized to take the real property in said County of Solano necessary for said toll road along the altered route thereof, as said altered route may be laid out by the commissioners appointed in accordance with law to lay out the same.

It Is Further Ordered that said C. B. Butler and Frank Knight be and they are hereby appointed commissioners to lay out said altered route of said toll road in the said County of Solano.

The foregoing order, made and adopted at a regular meeting of this Board of Supervisors, duly and regularly called and held on Monday, the 4th day of April, 1927, by the following vote on roll call.

Supervisor F. W. Birchmore
Supervisor Jos. B. Danielson
Supervisor D. M. Fleming
Supervisor C. E. Schmeiser
Supervisor Thomas McCormack

Ayes 5; Noes: none; Absent or not voting none.

Whereupon, the Chairman declared the foregoing order duly made and adopted, and it was so ordered.

State of California,
County of Solano.—ss.

I, G. G. Halliday, County Clerk of said County and Ex-Officio Clerk of the Board of Supervisors therein, do hereby certify that at a meeting of said Board held on the 4th day of April, 1927, Frank Knight was duly appointed Commissioner to lay out the altered route of the toll road for Sears Point Toll-Road Co., a corporation, by order of said Board duly passed and adopted on said 4th day of April, 1927, aforesaid as appears by the records of said Board of Supervisors now in my office.

Witness, my hand and Seal of said Board, this 4th day of April, 1927.

[Seal] G. G. HALLIDAY
County Clerk of the County
of Solano, State of California.

By .....
Deputy Clerk

State of California,
County of Solano.—ss.

I do swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully discharge the duties of Commissioner under said order of April 4th, 1927, according to the best of my ability.

FRANK KNIGHT

Subscribed and sworn to before me this 23rd day of April, 1927.

[Seal] G. G. HALLIDAY
County Clerk of the County
of Solano, State of California.

By .....
Deputy Clerk.

State of California
County of Solano.—ss.

I, G. G. Halliday, County Clerk of said County and Ex-Officio Clerk of the Board of Supervisors therein, do hereby certify that at a meeting of said Board held on the 4th day of April, 1927, C. B. Butler was duly appointed Commissioner to lay

out the altered route of the toll road for Sears Point Toll-Road Co., a corporation, by order of said Board duly passed and adopted on said 4th day of April, 1927, aforesaid as appears by the records of said Board of Supervisors now in my office.

Witness, my hand and Seal of said Board, this 4th day of April, 1927.

[Seal] G. G. HALLIDAY
County Clerk of the County
of Solano, State of California.

By.....
Deputy Clerk.

State of California,
County of Solano.—ss.

I do swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully discharge the duties of Commissioner under said order of April 4th, 1927, according to the best of my ability.

C. B. BUTLER

Subscribed and sworn to before me this 23rd day of April, 1927.

[Seal] G. G. HALLIDAY
County Clerk of the County
of Solano, State of California.

By.....
Deputy Clerk.

I, G. G. Halliday, County Clerk of the County of Solano, State of California, and ex-officio Clerk of the Board of Supervisors of said County, do hereby certify that the foregoing copy of Order Granting Application of said Sears Point Toll-Road Co. to construct toll-road, is a full, true and correct copy of the said Order filed in the office of the said Board of Supervisors on April 25th, 1927.

Witness my hand and the seal of said Board of Supervisors this 3rd day of June, 1927.

[Seal] G. G. HALLIDAY
County Clerk and Clerk of said
Board of Supervisors.

By.....
Deputy.

[Endorsed]: U. S. District Court S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 23. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 24

ORDER OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO FIXING RATE OF TOLLS AND LOCATION OF TOLL GATES IN SOLANO COUNTY ON TOLL-ROAD OF SEARS POINT TOLL-ROAD CO. IN SOLANO COUNTY.

Whereas, Sears Point Toll-Road Co., a corporation organized and existing under the laws of the State of California, has acquired the necessary land for and has constructed its toll road in Solano County along the altered route thereof approved by order of this Board of Supervisors made May 16, 1927, and duly entered in Volume 3, at page 612 of the Journal of Proceedings of this Board of Supervisors, Road Records; and

Whereas, all things necessary to be done and all proceedings necessary to be taken and had, to entitle said Sears Point Toll-Road Co. to have fixed by this Board of Supervisors the tolls to be taken by said Sears Point Toll-Road Co., its successors and assigns, upon its said toll road in Solano County, and to have fixed and approved the location of its toll-gates in said county, have been duly done, taken and had; and

Whereas, it has been made to appear, and this Board of Supervisors does hereby find and determine, that the tolls hereinafter fixed and prescribed to be taken in the County of Solano upon the said toll road in said county are not more than

sufficient to pay fifteen per cent, nor less than ten per cent per annum, on the cost of construction of said toll road in the County of Solano, after paying for repairs and other expenses for attending to the said road and its bridges in said county; now, therefore,

It Is Hereby Ordered, that the tolls that may be taken and shall be taken in said County of Solano by said Sears Point Toll-Road Co., its successors and assigns, on its said toll road in said county, are fixed as follows, to-wit:

(1) Each pedestrian, five cents.

(2) Each passenger in vehicle (except driver) five cents.

(3) Pneumatic tired vehicles, as follows:

Each passenger automobile, with driver, twenty-five cents.

Each automobile stage, with driver, twenty-five cents.

Each automobile truck, with driver, exclusive of load, twenty-five cents, plus three cents additional for each 200 pounds, or fraction thereof, of such load.

Each commercial delivery automobile, with driver, thirty cents.

Each hearse, with driver, except when in funeral procession, twenty-five cents.

Each ambulance, with driver, attendants and patients therein, twenty-five cents.

Each horsedrawn vehicle, with driver, except such vehicle, as, with loads, exceeds 1000 pounds in weight, ten cents.

Each such horsedrawn vehicle, with driver, exceeding, with load, 1000 pounds in weight, ten cents plus three cents additional for each 200 pounds or fraction thereof in weight of vehicle and load exceeding 1000 pounds.

Each motorcycle, with driver, ten cents.

Each bicycle, with rider, ten cents.

All of the foregoing tolls for vehicles and loads being for pneumatic tired vehicles and their loads.

(4) Vehicles having cushion, metal, or other non-pneumatic tires, without spikes or other protuberances or corrugations coming in contact with the road, as follows:

Each automotive vehicle, with driver, not exceeding, with load, 1000 pounds in weight, thirty-five cents.

Each such automotive vehicle, with driver, exceeding, with load, 1000 pounds in weight, thirty-five cents plus three cents additional for each 100 pounds or fraction thereof in weight of vehicle and load exceeding 1000 pounds and not exceeding 4000 pounds, and plus ten cents additional for each 100 pounds or fraction thereof in weight of vehicle and load exceeding 4000 pounds.

Each horsedrawn vehicle, with driver, not exceeding, with load, 1000 pounds in weight, ten cents.

Each such horsedrawn vehicle, with driver, exceeding, with load, 1000 pounds in weight, ten

cents plus three cents additional for each 100 pounds or fraction thereof in weight of vehicle and load exceeding 1000 pounds and not exceeding 4000 pounds, and plus ten cents additional for each 100 pounds or fraction thereof in weight of vehicle and load exceeding 4000 pounds.

(5) Hogs and Sheep, one cent each.

(6) Horses and cattle, five cents each.

(7) Free and half toll: Persons and vehicles entitled thereto under existing laws of the State of California.

(8) Each trailer or tow and load drawn by automotive or horsedrawn vehicle, same toll as if trailer or tow were automotive or horsedrawn.

(9) Each vehicle and load, with driver, drawn by mules or other animals, same toll as for equivalent horsedrawn vehicle and load.

(10) Each caterpillar, traction engine, or tractor, moving upon a moving track consisting of a flexible band or chain, each portion of which when resting upon the road presents a plane surface, one dollar.

(11) Each vehicle having metal or other non-pneumatic or non-cushion tires, with spikes, blocks, studs, flanges, cleats, ridges, beads, or other protuberances or corrugations coming in contact with the road, five dollars.

(12) Nothing hereinbefore set forth shall be deemed to authorize or permit any vehicle to be

driven or moved upon said road which by law, either by reason of its size, character, weight, tires, or other characteristic or condition, or for any other reason whatsoever, may not lawfully be driven or moved upon public highways in the State of California.

It Is Further Ordered, that the locations of the toll gates that may be erected and maintained in the County of Solano by said Sears Point Toll-Road Co., its successors and assigns, on its said toll road in said county, are hereby fixed and approved, as follows:

(1) On the bridge of said toll road crossing the Napa River, at or near the center of said bridge.

(2) On the bridge of said toll road crossing the Sonoma River, which said ridge extends across the boundary line between the Counties of Sonoma and Solano, in the State of California, at the point where said bridge crosses said boundary line.

It Is Further Ordered, that whereas, the said toll road extends beyond the County of Solano westerly into and within the County of Sonoma, State of California, the above prescribed tolls are fixed to be taken in the County of Solano upon that part of the said toll road in the County of Solano, to-wit all that portion thereof situate, lying and being in said County of Solano, and nothing hereinbefore contained shall relate or be construed to relate to the taking of tolls on, or the location of toll gates on, any part or portion of said toll road beyond the boundaries of the County of Solano, or in anywise to relate or apply to any part or portion of said toll road not within the County of Solano.

Passed and adopted this 4th day of June, 1928, by the following vote:

Ayes: Supervisor Birchmore
Supervisor Danielson
Supervisor Fleming
Supervisor Schmeiser
Supervisor McCormack (Chairman)

Noes: none

I, G. G. Halliday, County Clerk of the County of Solano, State of California, and ex-officio Clerk of the Board of Supervisors of said County, do hereby certify that the foregoing copy of order fixing rate of tolls and location of toll gates made by the Board of Supervisors and filed on the 4th day of June, 1928, is a full, true and exact copy of said order as the same is now on file in the office of said Board of Supervisors on this 4th day of June, 1928.

Witness my hand and the seal of said Board of Supervisors this 4th day of June, 1928.

[Seal] G. G. HALLIDAY
County Clerk and Clerk of said Board of Supervisors
By LEWIS MORRELL
Deputy Clerk

[Endorsed]: U. S. District Court S F. U S vs Stewart. No. 2685. Deft. Exhibit 24. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 25

ORDER OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO FIXING CERTAIN NEW RATES OF TOLL IN SOLANO COUNTY ON TOLL-ROAD OF SEARS POINT TOLL-ROAD CO.

Whereas, heretofore and on the 4th day of June, 1928, this Board of Supervisors by its order duly made and entered, fixed the rate of tolls to be taken upon that part of the toll-road of Sears Point Toll-Road Co. in Solano County; and

Whereas, among the tolls so fixed were the following:

(2) Each passenger in vehicle (except driver) five cents.

(8) Each trailer or tow and load drawn by automotive or horsedrawn vehicle, same toll as if trailer or tow were automotive or horse-drawn.

Whereas, the said Sears Point Toll-Road Co. has applied to have said two last mentioned tolls changed as hereinafter set forth; and

Whereas, it had been made to appear, and this Board of Supervisors does hereby find and determine that the tolls so fixed June 4, 1928, as hereinafter changed, to be taken in the County of Solano upon the said toll road in said county are not more than sufficient to pay fifteen per cent, nor less than

ten per cent per annum, on the cost of construction of said toll road in the County of Solano, after paying for repairs and other expenses for attending to the said road and its bridges in said county; now, therefore,

It Is Hereby Resolved and Ordered, that the tolls that may be taken and shall be taken in said County of Solano by said Sears Point Toll-Road Co., its successors and assigns, on its said toll road in said county, are fixed, as follows, to-wit:

(1) In lieu of five cents for each passenger in vehicle (except driver) the rate of toll for each passenger in vehicle (except driver) is hereby fixed at three cents.

(2) In lieu of the aforesaid toll for trailers, the rate of toll for trailers is hereby fixed as follows:

Each trailer attached to pneumatic-tired passenger automobile, ten cents, and every other trailer or tow and load drawn by automotive or horsedrawn vehicle, same toll as if trailer or tow were automotive or horsedrawn.

(3) All other tolls fixed by this Board of Supervisors June 4, 1928, as aforesaid, shall remain unchanged and in full force and effect, and are hereby reaffirmed.

It Is Further Ordered, that whereas, the said toll road extends beyond the County of Solano westerly into and within the County of Sonoma, State of California, the said tolls are to be taken in the County of Solano upon that part of the said toll

road in the County of Solano, to-wit, all that portion thereof situate, lying and being in said County of Solano, and nothing hereinbefore contained shall relate or be construed to relate to the taking of tolls on any part or portion of said toll road beyond the boundaries of the County of Solano, or in anywise to relate or apply to any part or portion of said toll road not within the County of Solano.

Passed and adopted this 2nd day of July, 1928, by the following vote:

Ayes: Supervisor Birchmore
Supervisor Danielson
Supervisor Fleming
Supervisor Schmeiser
Supervisor McCormack

Noes: None.

A true copy.
Attest.
[Seal] G. G. HALLIDAY,
Clerk.

[Endorsed]: U. S. District Court S F. U S vs Stewart. No. 2685. Deft. Exhibit 25. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 26

PETITION OF J. W. PEARSON ET AL. FOR RECLAMATION DISTRICT.

To the Honorable the Board of Supervisors of the County of Solano, State of California:

Your Petitioners John W. Pearson, William S. Chapman and J. H. Meredith show that they are holders of certificates of Purchase from the State of California representing more than one half of the hereinafter described body of Swamp and Overflowed Land; that the said land is susceptible of one mode of reclamation; that the greater part of said land is situated in the County of Solano, the remainder of said land is situated in the County of Napa. That your Petitioners desire to adopt measures to reclaim the same.

That the following is a description of the land which your Petitioners propose to reclaim.

First. The Southwest quarter, the West fraction of the Southeast quarter, the Southwest fraction of the Northeast quarter, the fractional Northwest quarter of Section Three, Section Four, Section Five, the North half, the North fraction of the Southwest quarter, the fractional Southeast quarter of Section Six, the small Northeast fraction of the Northeast quarter of Section Seven, the North fraction of the Northwest quarter, the fractional North-

east quarter of Section Eight, the North half, the Northeast fraction of the Southwest quarter, the fractional Southeast quarter of Section Nine, the Northwest quarter, the West fraction of the Northeast quarter, the Northwest fraction of the Southeast quarter, fractional Southwest quarter of Section Ten, the small Northeast fraction of the Northwest quarter of Section Fifteen in Township Three North Range Four West. Also Sections Thirty-one, Thirty-two, Thirty-three, the West fraction of the Northwest quarter, the West fraction of the Southwest quarter of Section Thirty-four in Township Four North Range Four West. Also the North fraction of the Northwest quarter, the fractional Northeast quarter, the Northeast fraction of the Southeast quarter of Section One, the Northeast fraction of the Northeast quarter of Section Two in Township Three North Range Five West. Also the South fraction of the Southeast quarter, the South fraction of the Southwest quarter of Section Twenty-six, the South fraction of the Southeast quarter, the Southeast fraction of the Southwest quarter of Section Twenty-seven, the East fraction of the Northwest quarter, the Northeast quarter, the small Northeast fraction of the Southwest quarter, the North fraction of the Southeast quarter of Section Thirty-four, the North half, the North fraction of the South-

west quarter, the fractional Southeast quarter of Section Thirty-five, Section Thirty-six in Township Four North Range Five West, Mount Diablo Base and Meridian, according to Survey Number 569, Swamp and Overflowed Lands. Containing 7413.48 acres, the whole whereof has been sold by the State of California as per Certificate of Purchase Number 2944, and is now owned by your Petitioner John W. Pearson who owns one undivided half, W. S. Chapman who owns the undivided one third, and George A. Nourse who owns one sixth thereof undivided.

Second. The East fraction of the Southeast quarter, the Southeast fraction the Northeast quarter of Section Thirteen, the Southeast fraction of the Northeast quarter, the Southeast quarter, the Southeast fraction of the Northwest quarter, the East fraction of the Southwest quarter of Section Twenty-four, the East half, the East fraction of the Northwest quarter, the East fraction of the Southwest quarter of Section Twenty-five in Township Four North, Range Five West, the small fraction of Southwest quarter of the Southeast quarter, the South fraction of the Southwest quarter of Section Seventeen, the small fraction of Southwest quarter of the Southeast quarter, South fraction of the Southwest quarter, the small fraction of the Southwest quarter

of the Northwest quarter of Section Eighteen, the West half, the West fraction of the Northeast quarter, the Southeast quarter of Section Nineteen, the Southwest quarter, the fractional Northwest quarter, the West fraction of the Northeast quarter, the fractional Southeast quarter of Section Twenty, the South fraction of the Southwest quarter of Section Twenty-one, the small fraction of the Southwest quarter of the Northwest quarter, the West fraction of the Southwest quarter of Section Twenty-seven, the South half, the fractional Northeast quarter, the fractional Northwest quarter of Section Twenty-eight, Section Twenty-nine, Section Thirty in Township Four North Range Four West, Mount Diablo Base and Meridian, according to Survey Number 115 Swamp and Overflowed Lands. Containing 4149.42 acres, the whole whereof has been sold by the State of California as per certificate of Purchase Number 3341, and is now owned as follows your petitioner John W. Pearson owns 3274.42 acres, F. Oppenheim owns 200 acres, one Bradbury owns 100 acres, one Washbourne owns 100 acres, Samuel Gracy owns 100 acres, John Hughs owns 100 acres, H. H. Gray owns 100 acres, A. Bly owns 75 acres, J. H. Meredith owns 100 acres.

Third. The fractional Southwest half of Section Twenty-seven, the fractional North half

of Section Twenty-eight, the fractional South half, the fractional Northwest quarter of Section Twenty-one, the fractional East half of Section Twenty, the fractional South half of Section Seventeen in Township Four North Range Four West Mount Diablo Base and Meridian according to Survey Number 141 Swamp and Overflowed Lands. Containing 435.36 acres, the whole whereof has been sold by the State of California, as per Certificate of Purchase Number 3755, the whole whereof is owned by your petitioner John W. Pearson.

That the number of acres in the whole of this district sought to be reclaimed is 1998 26/100 acres, no part of which is unsold by the State of California.

JNO. W. PIERSEN
WM. S. CHAPMAN
J. H. MEREDITH
CRAIG & MEREDITH
Attorneys for Petitioners

This Petition coming on for hearing regularly at the time & place designated for same, it being shown that due publication was made, and that the statements in said petition are true and correct and that no land has been improperly included therein or excluded therefrom: All the owners of said land appearing and consenting. Now therefore the Board of Supervisors of Solano County do find that the

statements contained in said Petition are correct, that no land has been improperly included therein or excluded therefrom: And the said Board approves the said petition.

J. F. CLOUTMAN
Chairman Board Supervisors

Attest: Decem. 3rd, 1873.
W. J. COSTIGAN,
Clerk

By WM. K. SOLES, D. C.

State of California
City and County of San Francisco—ss.

John W. Pearson being sworn says that he is one of the Petitioners to the foregoing petition, that he has read the same and knows the contents thereof that the same is true of his own knowledge.

JNO. W. PEARSON

Subscribed and Sworn to before me this 3d day of November, 1873.

[Seal] F. O. WEGENER
Notary Public

Recorded at request of Craig and Meredith January 16th, 1874 at 50 minutes past 1 o'clock P. M. in Liber No. 1 of Swamp Land Records, Records of Solano County, Page 46.....

GEO. C. McKINLEY
Co. Recorder

Filed Nov. 4th, 1873.

W. J. COSTIGAN
Clerk
By WM. K. SOLES
D. C.

Office of the County Clerk
County of Solano,
State of California.—ss.

I, the undersigned County Clerk of the County of Solano, and ex-officio clerk of the Board of Supervisors in and for said County do hereby certify the within and foregoing to be a full, true and perfect copy of an order made and entered on the minutes of said Board.

Witness my hand and the Seal of said Board, this 5th day of February A. D., 1937.

[Seal] G. G. HALLIDAY
Clerk.

By.....
Deputy Clerk.

[Endorsed]: U. S. District Court S F. U S vs. Stewart. No. 2685. Deft. Exhibit 26. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr 29 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 27

Department of the Interior
Washington

Oct 18 1912

Requesting data as to the limits of Mare Island in California.

The Honorable
The Secretary of the Navy.

Sir:

I have the honor to inclose a copy of letter "E" from the Commissioner of the General Land Office dated September 22, 1905, addressed to the Secretary of the Interior in regard to Mare Island in California, also a copy of letter dated October 8, 1912, from the Commissioner, addressed to Hon. Julius Kahn, at San Francisco, California, relative to listing certain lands in T. 4 N., R. 4 W., M. D. M., California, as swamp and overflowed lands for approval by this Department.

As it appears that some of the lands are in conflict with what is known as Mare Island, I have the honor to request that such data as may be in your possession relative to the limits of the land embraced in the island be forwarded to this Department for the use of the General Land Office, to the end that the matter of segregating the swamp

and overflowed lands from said island may be considered.

Very respectfully,

SAMUEL ADAMS

First Assistant Secretary.

[Endorsed]: U. S. District Court S F U S vs. Stewart. No. 2685 Deft. Exhibit 27 Fld June 15, 37 W. B. Maling, Clerk.

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr. 29 1940 Paul P. O'Brien Clerk

DEFENDANTS' EXHIBIT 28

11458-13 S/Mn

Department of the Navy.
Office of the Secretary
Washington.

February 1, 1913.

Sir:

Referring to your letter of October 18, 1912, in which you request certain information in regard to the boundaries of the naval reservation at Mare Island, Cal., I have the honor to advise that the Commandant, navy yard, Mare Island, has submitted the following report covering such information as the files of his office afford:

Originally all of the tule land adjoining and to the north of Mare Island was claimed as part of Mare Island. This tule land had, however, been sold by the State and the question as to the ownership of about 7413 acres was taken to court and Justice Field decided in the case of the San Francisco Savings Union and others versus Irwin in the Circuit Court, District of California, July 8, 1886, that title to the land in question rested with individuals who had purchased it from the State. (See 28 Fed., 708). All of the land originally claimed as Mare Island coming in township 4 North, range 4 West, Mt. Diablo meridian, was covered by this decision. This decision was afterwards con-

firmed by the Supreme Court of the United States. See 136 U.S., 578.

There is forwarded herewith blue print of plan R-212 which shows the present limits of Mare Island. There is no question as to the title of all of the high land on Mare Island, but to the north of this high land the section shown as swamp and over-flowed land survey 34 with accretions thereto, is in dispute. Survey 34 extends from high land of Mare Island to the southern limits of the land covered by the decision in the case of the San Francisco Savings Union and others versus Irwin. Title to swamp and over-flowed land covered by survey 34 and accretions thereto, is claimed by E. H. Sawyer and the case of Sawyer versus Osterhaus was heard before Judge Van Fleet of April 26, and 27, 1912, in the Circuit Court, District of California, Decision has not yet been handed down.

The Bureau of Yards and Docks reports that its files do not furnish any additional information in regard to this matter.

The following extracts from a report of the Commandant, navy yard, Mare Island, dated December 27, 1910, may be quoted as having some bearing on the information requested by you:

There is enclosed a blue print, plan R-212 dated Sept., 1910, (this is the same print referred to in the above quoted report) showing Mare Island and also the location (as near as can be determined) of the land embraced by

Swamp & Overflowed Land Survey #34 and the accretions thereto. The Government has, in the past, claimed possession of this land covered by S & O Survey #34 and to the accretions thereto, and previous to 1883 claimed also all land to the north shown as Island No. L on C&GS Chart #5533.

The United States purchased Mare Island from Bissell, Aspinwall and McArthur on January 4, 1853, * * *, the land being described as follows: 'All that tract of land and island, called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States, sent to California for the selection of a site for the Navy Yard there, including all the tule, or low land, and marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays, creeks and other waters, privileges, benefits, advantages, tenements,' etc. etc.

There was filed in the office of the land commissioner, acting under act of March 3, 1851, a petition signed by G. W. P. Bissell and William H. Aspinwall, dated August 31, 1852, that the commissioners confirmed to them title of land known as Mare Island.

The land as confirmed by the commissioners was described as follows: 'The place of which confirmation is hereby given is situate in the Bay of San Francisco, and is called Isla de

laYegua, or Mare Island, and being an island is bounded by the water edge.'

An act of Congress dated Sept. 28, 1850, called the Arkansas Swamp Land Act, ceded to the various states such swamp and overflowed land as was made thereby unfit for cultivation and which was unsold on the 28th of Sept., 1850.

Under this act the State of California on March 18, 1857, issued a patent to the land embraced by Swamp & Overflowed Land Survey #34, 164-1/2 acres, to David N. Darlington. The accretions to the land now bring the total acerage to 466-1/2 acres and the title under the state is now possessed by E. H. Sawyer.

On April 7, 1874, the state issued a patent to one George W. Pearson for the land north of the Sawyer claim and suit was brought against the Government * * * for the possession of this land, about 7413 acres, * * *. This is the suit reported in 28 Fed., 708.

The blue print, R-212, Sept. 1910, referred to in the above quoted reports is enclosed herewith.

A decision covering one phase of the case of Sawyer v. Osterhaus involving the title of the Government to a part of the land on Mare Island will be found in 195 Fed., 655.

It is suggested that, until the Government's claim to land on Mare Island is definitely decided, it would be well to consider not listing as swamp or

over-flowed lands any lands on Mare Island now claimed by the Government.

Respectfully yours,
PHILIP ANDREWS
Acting Secretary.

The Honorable
The Secretary of Interior.

(Enclosure) Blue Print

[Endorsed]: U. S. District Court S F U S vs Stewart No. 2685 Deft. Exhibit 28. Fld June 15, 37 W. B. Maling, Clerk

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr 29 1940 Paul P. O'Brien Clerk

DEFENDANTS' EXHIBIT 30

DEPARTMENT OF THE INTERIOR

General Land Office

J. E.

Washington, D. C.
July 25, 1879.

Theo. Wagner, Esq.,
Surveyor General,
San Francisco, Cala.

Sir:

Mare Island—291

You are requested, immediately upon the receipt hereof, to forward to this Office a copy of the final confirmation of Mare Island to G. W. P. Bissell and Wm. P. Aspinwall, by the District Court, said confirmation bearing date March 2, 1857. Also description of limits. Has the Island been surveyed?

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

[Endorsed]: U. S. District Court S F U. S. vs. Stewart No. 2685 Deft. Exhibit 30. Fld June 15, 37 W. B. Maling, Clerk

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr 29 1940 Paul P. O'Brien Clerk

DEFENDANTS' EXHIBIT 31

DEPARTMENT OF THE INTERIOR

General Land Office

N.F.

Washington, D. C.
Aug. 7, 1879.

Theodore Wagner, Esq.,
U. S. Surveyor General,
San Francisco, California.

Sir:

285—Mare Island

Referring to letter from this Office dated the 25th ultimo, requesting information upon the subject of Mare Island in California, I have also to request that if there is in your office a plat and notes of the survey of said Island, made or approved by government officers, you will cause to be prepared and forwarded to this Office a copy of such survey.

Very respectfully,
J. M. ARMSTRONG
Acting Commissioner.

[Endorsed]: U. S. District Court S F U S vs. Stewart No. 2685 Deft. Exhibit 31. Fld June 15, 37 W. B. Maling, Clerk

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr 29 1940 Paul P. O'Brien Clerk

DEFENDANT'S EXHIBIT 32

Theo. Wagner
U. S. Surveyor General

J. A. Robinson,
Chief Clerk

U. S. SURVEYOR GENERAL'S OFFICE
California
No. 610 Commercial Street,

Post Office Box No. 2260

San Francisco, Aug. 7th, 1879

Hon. J. A. Williamson,
Commr. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of 25th ult., directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and Wm. H. Aspinwall for Mare Island I have the honor to state that although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd day of March, 1857, no such decree can be found.

I inclose herewith a copy of the plat of survey and field notes of Freeman's survey made in July, 1877, Copy of Instructions to Freeman to survey said island, Copy of the Certificate of Advertisement, Copy of the Decree of Confirmation by the U. S. Board of Land Commissioners; Copy of a

certificate from the Clerk of the U. S. District Court with extracts from the minutes in the case; and a Protest filed in this office July 14, 1879, by Bernard T. Hanley, Esq., of Washington City as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 1938.

Very respectfully,
Your obdt. serv't,
THEO. WAGNER,
U. S. Sur. Gen'l.

No. 38,856

THEO. WAGNER
U. S. Surveyor-General for California

Date Aug. 7, 1879

SUBJECT:

Transmitting Copy Plat of Survey and Freeman's field notes of Survey of "Mare Island"—

Also Certificate of Advertisement, etc., and states reasons for disapproving survey.

See letter from the Secretary of the Navy dated Aug't 4, 1879. Filed. See to Secy. Int. Sept. 22, 1905 relative to making further survey under direction of G. L. O.

See 1343798.
Referred to Division E.
Received (G. L. O.) Aug. 18, 1879.
8 papers

[Endorsed]: U. S. District Court SF U S vs Stewart No. 2685 Deft. Exhibit 32 Fld June 15, 37 W. B. Maling, Clerk.

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr 29 1940 Paul P. O'Brien Clerk

DEFENDANTS' EXHIBIT 33

Washington, D. C.
July 5, 1879.

To the Surveyor General of the United States for the State of California.

Sir:—

It has lately came to the knowledge of the present owners of certain tulé or swamp and overflowed land situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the island of Mare Island, (being the same property hereinafter referred to and described herein and in the papers hereto annexed) that the Government of the United States, through you, its proper representative, had lately surveyed said land to the United States, claiming the same as included in the purchase by it of the said island from George W. Bissell et al in the year 1852.

The particular tule or swamp and overflowed land referred to is that described in the survey made by H. Patten, surveyor of said Solano County on the 11th and 12th of June, 1855, (a copy of which is hereto annexed) and in the Letters Patent (copy also annexed), of the State of California to one David N. Darlington, issued under the seal of said State on March 18th, 1857; the title to such swamp and overflowed land having previously become vested in said State under and by virtue of the Act of Congress approved September 28th,

1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the premises, I, Bernard T. Hanley, attorney for the said present owners and acting herein by their direct authority, do solemnly protest against said survey of said property to the United States, (the same being already legally vested in them, the said owners) and against the signing and confirmation thereof; and while hereby entering, in behalf of said owners their said protest, I also, for and in their behalf, respectfully request that if, notwithstanding protest, you should sign said survey and forward same to the General Land Office or other proper office in Washington, you should at the same time, or as soon thereafter as practicable, forward this protest to the same office as well as the copy of Letters Patent and Survey herewith enclosed and referred to.

And, acting as aforesaid, I do further protest against said survey in so far as it includes certain additional tule or swamp and overflowed lands located adjacent to said Mare Island under authority of said Act of Congress and of certain school land warrants of the State of California. As will appear by reference to certificate of location filed in the office of the County Clerk of Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully,

BERNARD T. HANLEY,

Atty. for Owners.

United States of America,
State of California.

To all to whom these presents shall come, greeting,

Whereas, under the provisions of an Act of Congress of the United States approved the 28th day of September, A. D. 1850 entitled "An Act to enable the State of Arkansas and other States to reclaim swamp lands within their limits," in which act the manner of selecting and setting apart swamp and overflowed lands, are fully set forth, and whereas, in accordance with the provisions of the Act of Congress, the title of which is above recited, the Legislature of the State of California on the 28th day of April, A. D. 1855, passed an act entitled "An Act to provide for the sale of the swamp and overflowed lands belonging to the State," which Act authorized the location and disposal of a portion of the overflowed lands donated to the State of California by the Act of Congress the title of which is above recited.

And Whereas it appears by the Certificate of the Secretary of State bearing date the 18th day of March, A. D. 1857, that he has been duly notified by the Treasurer of the State of California that David N. Darlinton has paid $164.55 to the Treasurer of Solano County, State of California, in full payment for 164.55 acres of Swamp and overflowed lands situated in said Solano County and described in the county records of said county as follows, to wit: The south fractional half of the southeast

quarter of Section No. Ten, the North-East fractional portion of the North-East quarter of Section No. 15, the South-West fractional portion of the South-West quarter of Section No. 14, and the North East fractional portion of the South-West quarter of Section 14, the whole lying between San Pablo and Napa bays in said County of Solano and being in Township Number three north Range four west of Monte Diablo meridian and base and conforming to the U. S. Government survey.

Now therefore all the requirements of the Act of Congress as well as the Act of the State Legislature in relation to swamp and overflowed lands having been fully complied with he the said David N. Darlinton has become entitled to a patent from the State of California for the tract or parcel of swamp or overflowed lands above described; and there is hereby granted by the State of California to the said David N. Darlinton and to his heirs and assigns forever the said described tract or parcel of swamp and overflowed lands with the appurtenances; the said David N. Darlington, his heirs and assigns to have and to hold forever the said described tract or parcel of land with all the rights, privileges and appurtenances unto the same belonging or in any way appertaining.

In Testimony Whereof, I, J. Neely Johnson, Governor of the State of California, have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand at the City of Sacramento this the 18th day of March in the year of Our Lord A. D. 1857.

[Seal of State] (Sig'd) J. NEELY JOHNSON.

Attest.

DAVID F. DOUGLASS,
Secretary of State.

Copy

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14—and Fractional N. E. qr. of Sec. 15 of Township 3, N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 60°, 270.00 chains. Thence run W. 50.00 chains; From this point the target on the Island bore S. 67°, 20′ W.; thence run S. 40.00 chains, from which point target bore W.; thence run W. 20.60 chains to shore of Napa Bay—distance from this point to target 73.75 chains.

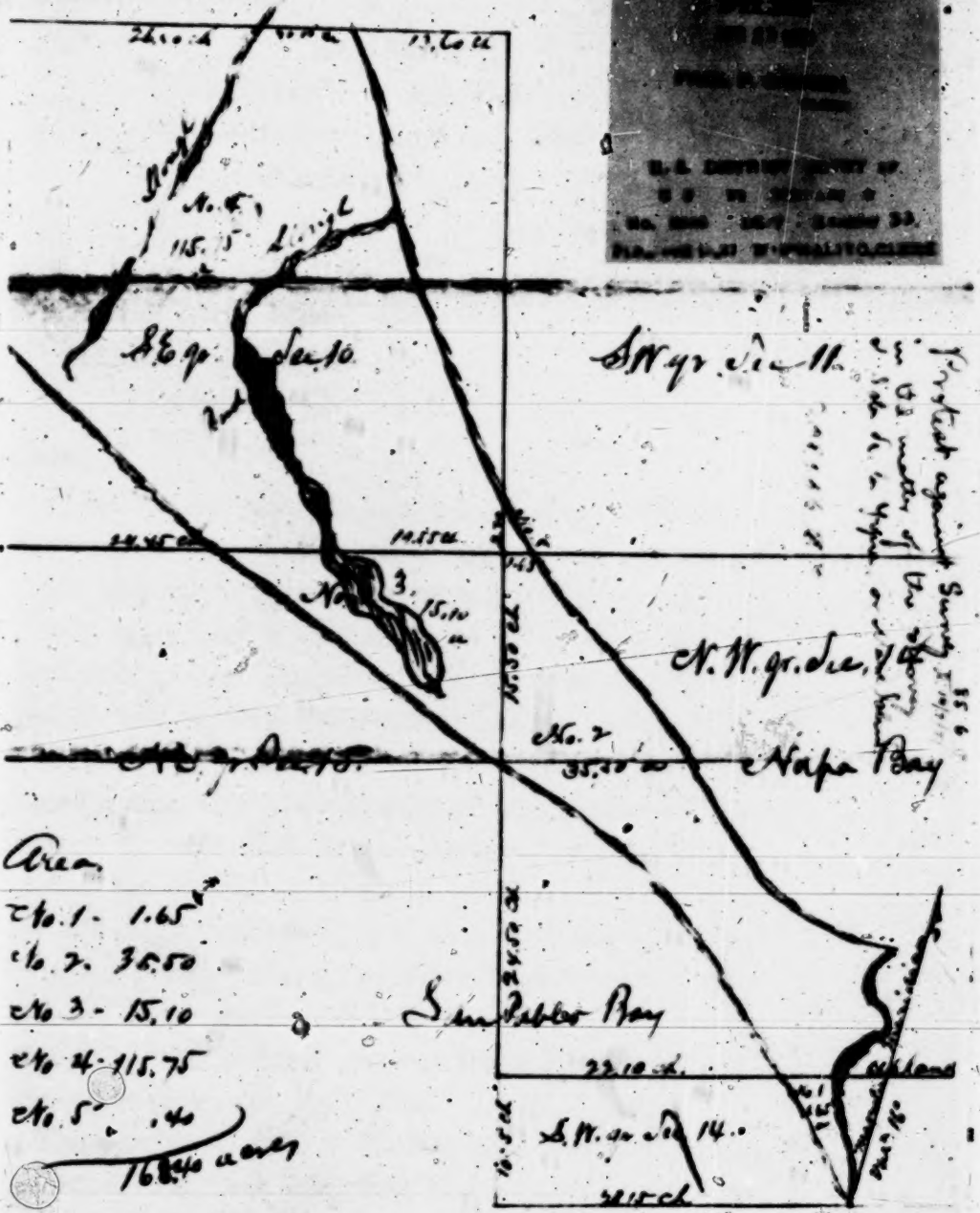
Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo Bay 39.20 chains; then N. 52° W. along the same shore 26.50 chains; thence N. 56° W. 7.00 chains; thence N. 22.55 chains; thence E. 21.53 chains to Napa Bay; thence South-Eastwardly along the shore of Napa Bay to the

upland and thence with the sinuosities of the upland to the place of beginning. Which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

(Sigd) H. PATTON
County Surveyor
Solano County.

F-6


S.E. gr. Sec. 10
S.W. gr. Sec. 11
N.W. gr. Sec. 14
No. 2
35.50 ac
Napa Bay
Sun Pablo Bay
S.W. gr. Sec. 14
Area
No. 1 - 1.65
No. 2 - 35.50
No. 3 - 15.10
No. 4 - 115.75
No. 5 - .40
168.40 acres

DEFENDANTS' EXHIBIT 34

Warren C. Stone B. T. Hanley

Law Offices of
STONE & HANLEY,
No. 319 Four-and-a-half Street.
Washington, D. C.,

July 16th, 1879

The Commissioner of the
General Land Office
Interior Department,
Washington, D. C.

Sir:

It has lately come to the knowledge of the present owners of certain tule or swamp and overflowed land, situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the Island known as "Mare Island," (being the same property hereinafter referred to, and described, herein and in the papers hereto annexed), that the Government of the United States, acting through and by its proper representative, to wit the Surveyor General of the United States for the State aforesaid, had surveyed the said land to itself, for the use of the Navy Department, claiming the same as included in the purchase of said island by the United States from George W. P. Bissell et al in the year 1853.

The particular tule or swamp and overflowed land referred to is that described in the survey made by

H. Patton, Surveyor of said Solano County on the 11th and 12th days of June A. D. 1855, (a copy of which survey is hereto annexed), and in the Letters Patent of the State of California, issued under the seal of said State March 18th A. D. 1857, (copy also annexed), the title to such swamp and overflowed land having previously become vested in the State under and by virtue of the Act of Congress approved September 28th, 1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the foregoing, I, as attorney for the said present owners and acting herein by their direct authority, do formally protest against said survey and the consideration or confirmation thereof by you or other proper officer of any Department or Bureau of the Government of the United States, and in protesting request that if testimony be necessary the Commission to take the same may issue at the earliest practicable date.

And acting as aforesaid, I do further protest against said survey in so far as the same includes other tule land, located in like manner adjacent to Mare Island, aforesaid, under authority of an Act of Congress passed May 3, 1852, and of certain school land warrants of the State of California, numbered 151 and 274, reference being had to the certificate of location filed in the office of the County Clerk of said Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully,

B. T. HANLEY,
Atty. for the Owners.

(Copy)

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14 and Fractional N. E. qr. of Sec. 15 of Township 3 N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 16°, 270.00 chains; thence run W. 50.00 chains; from this point the target on the Island bore S. 67° 20′ W.; thence run S. 40.00 chains; from which point target bore W. thence run W. 20.60 chains to shore of Napa bay; distance from this point to target 73.75 chains.

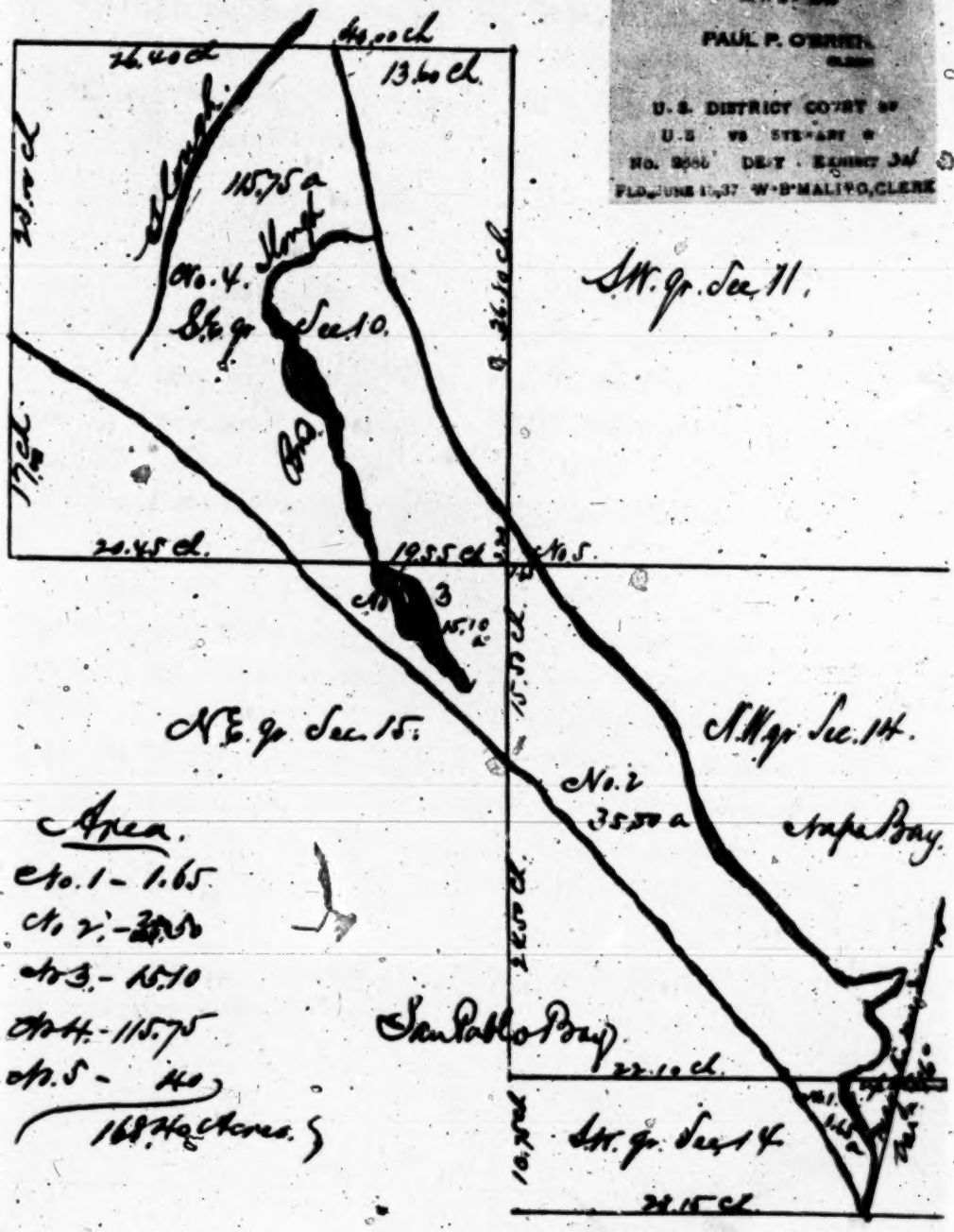
Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo bay 39.20 chains—thence N. 52° W. along the same shore 26.50 chains—thence N. 56° W. 7.00 chains—thence N. 22.55 chains—thence E. 21.53 chains to Napa bay—thence Southeastwardly along the shore of Napa bay to the upland, and thence with the sinuosities of the upland to the place of beginning, which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

H. PATTON,
County Surveyor,
Solano County.

G-3

9507
FILED
APR 29 1940
PAUL P. O'BRIEN
CLERK
U. S. DISTRICT COURT
U. S. vs STEWART
No. 2686 DEPT. EXHIBIT 34
FLD. JUNE 1937 W. B. MALIVO, CLERK



DEFENDANTS' EXHIBIT 35

Copied from Report of U. S. Surveyor General of California, dated August 22, 1878, printed as part of Executive Documents, 3rd Session, 45th Congress, 1878-1879, Vol. 9, pages 377, 390.

"United States Surveyor General's Office.

San Francisco, Cal., August 22, 1878.

P. 377

Sir: In compliance with your instructions I have the honor to submit, in duplicate, the annual report of this office in relation to the surveying service in California during the fiscal year ending June 30, 1878.

I also forward tabular statements as follows:

* * * * * * *

On the 13th of September, 1877, Henry G. Rollins resigned the office of United States surveyor general for California, and was succeeded on the 17th

P. 390 of October of the same year by General John W. Ames. On the 6th of April, 1878, after several months of painful illness, General Ames departed this life, respected and beloved by all with whom he had come in contact during his brief administration.

The duties of the office were assumed by the present incumbent on the 25th of June, 1878.

Edward D. Knight, an employe of this office for many years, died March 6, 1878, after a prolonged illness.

Very respectfully, your obedient servant,

THEO. WAGNER
United States Surveyor
General for California.

Hon. J. A. WILLIAMSON,
Commissioner of the General Land Office."

[Endorsed]: U. S. District Court S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 35. Filed June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 36

Department of the Interior
General Land Office
Washington

February 28 1921.

U. S. Surveyor General,
San Francisco, California,

Sir:

Special instructions.
Survey of Mare Island and adjacent lands.

I am in receipt of your letter dated January 31, 1921, transmitting special instructions providing for the survey of all unsurveyed lands including both swamp and upland in Tps. 3 and 4 N., R. 4 W., M. D. M., and including Mare Island, in accordance with departmental decision D-28814, dated December 4, 1920, as promulgated by letter "E" dated December 20, 1920.

It appears that under a contract dated July 19, 1877, James E. Freeman, U. S. Deputy Surveyor, executed a survey of the private land claim, which was confirmed to George W. Bissell and William H. Aspinwall and which was called Isla de la Yegua or Mare Island, and which being an island was described as bounded by the water's edge.

The returns of this survey were transmitted by the U. S. Surveyor General with his letter dated August 7, 1879, copy transmitted under separate cover, from which it will be observed that a protest

had been filed in your office July 14, 1879, by Bernard T. Hanley, of this city, as attorney for certain parties claiming under a survey of tule or swamp land made by H. Patton, Surveyor of Solano County in June, 1855, title to which land purported to be issued to David N. Darlinton. A facsimile protest dated July 16, 1879, was filed in this office about the same time.

It further appears that the survey by Freeman was not approved by....., Surveyor General Ames, the copy of the plate received with his 1877 letter dated November 5, ~~1878~~, being merely certified as correctly copied from the original on file in his office and a later copy by Surveyor General Wagner dated August 6, 1879, bears the same character of certification.

For such information as they may afford, copies of the Surveyor General's letter dated August 7, 1879; of the field notes and plat of Freeman's survey and of the protest by Hanley are transmitted under separate cover.

The letter dated December 13, 1863, from the Surveyor General, related to the survey of Reservation No. 7, the essential papers of which, unfortunately, have been misplaced.

In reference to the limits of Mare Island, if determined by the surveyor to extend to Navy Yard and Napa Sloughs, in T. 4 N., Rs. 4 and 5 W., it would be proper for him to meander both banks of said Navy Yard Slough in Ts. 3 and 4 N., R. 4 W., establishing meander corners at intersection

with surveyed lines, but inasmuch as T. 4 N., R. 5 W., has been protracted as swamp and overflowed lands, it is not believed that the survey of Mare Island should be extended into said township at the present time.

The special instructions received with your letter dated January 31, 1921, are found satisfactorily prepared, but may be supplemented by such further instructions as are deemed appropriate after consideration of the data herewith.

Very respectfully,

[Signature illegible]

Assistant Commissioner.

[Endorsed]: U. S. District Court. S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 36. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 37

DEPARTMENT OF THE INTERIOR
Washington

August 17, 1923.

D. 28814.
State of California,
Balfour-Guthrie Investment Company,
Interveners.
"G"
254852—1910.
Rejection of swamp-land selection.
Remanded with instructions.

MOTION FOR REHEARING.

By decision of December 4, 1920, on motion for rehearing, the Department directed the Commissioner of the General Land Office to cause survey and plats to be made of townships 3 and 4 north, range 4 west, M. D. M., California, and submitted to the Department, for consideration in connection with the application of the State of California and its transferees for patents covering all swamp lands in said townships.

By letter of April 23, 1923, the Commissioner transmitted the survey returns for the two townships mentioned, and in that connection it was stated that the plats show the areas which are classed as swamp and overflowed lands as well as the public lands in said townships; that the extent of Mare

Island is indicated by the report of the surveyor, and that the division line between the lands claimed by the public and the lands occupied by the Navy Department is well defined by a wire fence shown on the plat between Secs. 10 and 15, T. 3 N., R. 4 W.; that the survey as executed is technically correct and is based on the only available control to be found. It was further stated, however, that formal acceptance of the survey was withheld in view of the circumstances, awaiting instructions relative thereto by the Department.

The Navy Department was advised that the survey returns were pending here and would be available for inspection with a view to making known any objections thereto prior to final examination of the Department.

Under date of June 4, 1923, the Secretary of the Navy replied as follows:

> In your letter D-28814 of May 3rd you advised that the Department of Interior had received the surveys of fractional townships 3 and 4 N., R. 4 W., M.D.M., California, that include within their limits portions of Mare Island and the Mare Island Navy Yard.
>
> Since my letter of February 5th was written, in which request was made that the final action on these surveys be withheld until this Department had been advised as to the results thereof suit was instituted in the Supreme Court of the District of Columbia by James E. O'Donnell,

plaintiff, vs. Edwin Denby, Secretary of the Navy, defendant, in equity No. 41138, praying that an injunction issue restraining the Secretary of the Navy and all persons acting under him from asserting any right, title or possession in or to any lands described in the bill as covered by California Segregation Survey No. 34. The defense of this suit is being handled by the Department of Justice.

Attention is invited to the fact that the title to all of the lands alleged to be swamp and overflowed lands and originally considered as a part of Mare Island has been adjudicated by the courts. The title to the property comprised by swamp and overflowed lands Survey No. 569, embracing all of the lands north of Survey No. 34, was lost to the United States by the decision in Irwin vs. San Francisco Savings Union, 136 U. S., 578.

Subsequently an action of ejectment was brought to oust the United States from property covered by Survey No. 34. This action was prosecuted in the District Court for the Northern District of California and resulted in favor of the Government, no appeal being taken therefrom. The report of the case may be found in 212 Fed. Rep., 765. It will be noted that the case now pending before the Supreme Court of the District of Columbia also involves this particular survey. For your information in the premises, there is enclosed a copy of my

letter of April 5 addressed to the Attorney General embodying certain information for use in the defense of this suit.

In view of the foregoing, and as a suit is now pending involving the title to a portion of the land covered by the surveys mentioned in your letter, it is not believed that at the present time this Department is in a position to take any action in the matter. It is suggested, however, if you deem such procedure not inappropriate that the Department of Justice be advised as to the results of the surveys.

By letter of August 13, 1923, counsel for O'Donnell advised this Department that he had signed a proposed form of dismissal of the suit of O'Donnell v. Denby, which would result in dismissal of the said suit.

In view of the decision by the Supreme Court in 136 U. S., 578, and the attitude of the Navy Department in respect to the lands covered by State Segregation Survey No. 569, this Department is of opinion that all of the swamp lands in that area should be patented to the State. But in view of the decision of the District Court in 212 Fed. Rep. 765, and the claim of the Navy Department in respect to the lands covered by State Segregation Survey No. 34, this Department takes the position that no land within the reservation should be patented to the State.

The plat of T. 3 N., R. 4 W., does not show the location of these State segregation surveys, and the

northerly limits of the Mare Island Navy Yard reservation are merely indicated by the boundary fence, without closure of the survey thereon.

The record, including the survey returns, is accordingly remanded for preparation of a proper plat of T. 3 N., R. 4 W., which will segregate the Navy Yard reservation and effect a closure of the survey of the outlying subdivisions on the northerly boundary line of the reservation as defined by the boundary fence, and leave the reservation intact without subdivisional survey.

Upon completion of the survey and plat of fractional T. 3 N., R. 4 W., as herein directed, the same may be approved if found in all respects sufficient.

No objection to the survey and plat of T. 4 N., R. 4 W., is observed, and the same may be approved by the Commissioner if deemed sufficient.

Upon approval of the survey and plats, disposal of the lands not reserved should be made in accordance with applicable public land laws, and in harmony with the views herein expressed.

It is deemed unnecessary at this late date and in view of the court decisions mentioned, to segregate by survey the entire area reported by the surveyor as embraced in Mare Island. That would include the lands covered by State Segregation Survey No. 569, which area is conceded by the Navy Department to have been lost to the Government by the Supreme Court decision in 136 U. S., 578. It will be sufficient for practical purposes to segregate the existing reservation as above indicated and to with-

hold that area from patent so long as the decision in 212 Fed. Rep., 765, stands unimpeached.

(Signed) E. C. FINNEY,
First Assistant Secretary.

[Endorsed]: U. S. District Court SF U. S. vs. Stewart. No. 2585. Deft. Exhibit 37. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 38

DEPARTMENT OF THE INTERIOR
General Land Office
Washington

TCH

September 19, 1923.

In Reply Please Refer to
254852 "E" TCH

U. S. Surveyor General,
San Francisco, California.

Sir:

Authorizing Supplemental Survey. Group 96, Mare Island California.

Referring to your letter of March 16, 1923, submitting for consideration the returns of surveys in Ts. 3 and 4 N., R. 4 W., M.D.M., Group 96 California involving the lands included in Mare Island Navy Yard, it now becomes necessary to inform you that the work was upon examination found to be technically correct, but in obedience to Department instructions of December 4, 1920, action by this office looking to its acceptance was withheld and the entire record submitted to the Department for consideration as to the extent of the Naval Reserve and the swamp and overflowed lands claimed by the State.

Under date of August 17, 1923, the Honorable First Assistant Secretary expressed the opinion

that all of the swamp land included in State segregation survey No. 569 (see U. S. Supreme Court Decision of February 3, 1890, Irwin vs. San Francisco Savings Union, 136 U. S. 576), should be patented to the State, but in view of the decision of the District Court in the case of Sawyer vs. Osterhaus et al., (212 Fed. Rep. 765), and the claim of the Navy Department in respect to the lands covered by State segregation survey No. 34, it was decided that no lands within the Naval Reserve should be patented to the State. The record was accordingly remanded with directions that the plat of T. 3 N., R. 4 W., be revised so that it will exhibit the segregation of the Navy Yard Reserve from the other portions of the township,—the north boundary line of the reserve to be coincident with the boundary fence as shown upon the plat as now prepared and referred to on page 1 of the Report of Lands Properly Belonging to Mare Island by Francis E. Joy, U. S. Cadastral Engineer. The Honorable First Assistant Secretary further directs that the Naval Reserve be left without subdivisional survey. We take it, therefore, that the lines and corners already established under the pending survey as executed under Group No. 96 are to be removed from the ground and reference thereto omitted from the final returns, in so far as they involve the area lying south of the boundary fence.

The only record that this office has of State segregation surveys 569 and 34 is in the form of two small photographic copies of the plats of each in-

cluding but a small portion of the field notes of the latter and an illegible copy of the field notes of the former. The original records of these two surveys are probably on file with the State officials in Sacramento. The photographs are sufficient, however, to show beyond any doubt that the neck of land lying between San Pablo Bay and Napa River was much narrower when the State segregation surveys were made than when the official survey of the township was executed by Engineer Joy under Group No. 96 or else the meander lines of the State segregation surveys were grossly inaccurate. Joy reports that he was unable to find any definite marks of the two State segregation surveys on the ground and that the agent for the present claimants was unable to tell him of the existence of any corner, and this office is able by platting to fix but approximately the relation of the two State segregation surveys to the official surveys as executed under said group. (See pencil sketch inclosed).

It is assumed that the position of the fence shown by Joy's survey to bear north and south and east and west represents the common boundary between said State segregation surveys 569 and 34 as originally executed and that the extension of the fence from where it leaves the south course and runs south 40° west (see page 28, Book "C" of the survey of T. 3 N., R. 4 W.) to an intersection with the meander or mean high water line of San Pablo Bay is designed to divide the lands lying south of said State segregation surveys and not originally

included therein, equitably and in proportion to the respective frontings on the bay of said surveys. The apparent change in the position of the shore line of the bay is accounted for by Engineer Joy on page 2 of his report as follows:

> "A long breakwater, known as Dike 12, built in sections from 1908 to 1912, and noted at the meander corners of fracl. secs. 23 and 26, and secs. 25 and 26, apparently has created a settling basin in secs. 15, 22, 23, and 26, and is rapidly filling on the San Pablo Bay side. At the present time, from the cor. of secs. 14, 15, 22, and 23, I estimate that it is a mile in distance to the edge of the water at low tide. This probably accounts for the fact that there is no defined bank along the Bay side in sec. 15."

Turning now to the opposite end of the fence, it is evident from Joy's returns that it runs east for something more than a quarter of a mile and terminates in the NW¼ SE¼ of Sec. 10, a full quarter mile from the mean high water line of Napa River. Applying the same reasoning here that the lands lying beyond the north and south and east and west portions of the fence were never included in State segregation surveys 569 and 34, no other conclusion can be reached than that said additional lands should be divided equitably in proportion to the frontings on Napa River of said surveys 569 and 34. (See U. S. Supreme Court Decision in the case of Johnson vs. Jones, 1 Black 209).

It is believed that this can be accomplished satisfactorily if the fence is extended from its present terminus in a direction normal to the general course of the river as defined by its right or west bank to an intersection with mean high water as indicated by the meander line.

As the Department directed in letter of September 6, 1923, that this case be made special and disposed of within the shortest time possible, you are requested to issue special instructions providing for the necessary survey to carry out the decision of April 17, 1923, copy of which is inclosed, and submit the same to this office for approval at the earliest possible date. Also advise the Assistant Supervisor of Surveys of the necessity of arranging for the assignment of a surveyor to the field work just as soon after the approval of the instructions as is possible.

Very respectfully,

[Signature illegible]

Assistant Commissioner.

Department of the Interior.

Approved: Sept. 19, 1923.

[Signature illegible]

Assistant Secretary.

[Endorsed]: U. S. District Court SF. U. S. vs. Stewart. No. 2685. Deft. Exhibit 38. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 39

Circular

DEPARTMENT OF THE INTERIOR

General Land Office

Washington D. C.

April 17, 1879

Sir:

Filing Plats in Local Land Offices

Copy sent to each Sur. Genl. noted in respective Vol.

Experience has shown that it is often necessary to order the suspension of plats of survey in the local land offices and frequently the cancellation of the survey. The filing of the triplicate plats of surveys in the local land offices, before the duplicates have been approved by this office, has frequently led to complications of title and individual hardship to persons making entries according to such surveys, in cases where it has been necessary to set aside or cancel them.

For these reasons you will not, after the receipt of this order, file the duplicate plats in the local land offices until the duplicates have been examined

in this office and approved, and you officially notified to that effect.

Very respectfully,
Your Obedient Servant
J. A. WILLIAMSON
Commissioner

Gen. Jas. H. Baker
Surveyor General of Minnesota,
St. Paul, Minn.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 40

No. 13062

State of California

Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of letter of Sec. of Navy to Governor of California, and opinion of Attorney General re Mare Island Navy Yard with the copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. I further certify that this authentication is in due form and by the proper officer.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 30th day of April, A. D. 1918.

[Seal] FRANK C. JORDAN,
Secretary of State.

By.....
Deputy.

(Copy)

(Especially see pp. 7 & 8 of this Exhibit)

U. S. Navy Department

October 3, 1853.

Sir,

I have the honor to address your Excellency on a subject of much interest to the State of California as well as to the United States.

The last Congress made certain appropriations for the purpose of erecting buildings & c with a view to establish a Navy Yard at San Francisco. There was passed at the same time also an Act in reference to the construction of a Basin and Railway in connection with the Dock now being built in the Bay of San Francisco. My predecessor in the exercise of authority with which Congress had invested him, selected Maré Island as the most suitable place for the Navy Yard and the proper place for the Dock. He accordingly purchased the same. There is a law passed in 1841, Sept. 11, which enacts, "That no public money shall be expended upon any site or land hereafter to be purchased by the United States for the purposes aforesaid, until the written opinio of the Attorney General shall be had in favor of the validity of the title and also the consent of the Legislature of the State in which the land or site may be, shall be given to said purchaser."

Congress, however for some reason evinces much particularity in this case and accompanies the Act

in regard to the expenditures of money in San Francisco, with this provisio,

"That before this sum shall be expended, the Attorney General of the United States shall decide that the United States shall decide that the land, upon which the buildings are to be erected".

In view of these facts it became my duty to ask the opinion of the Attorney General a copy of which accompanies this communication.

This opinion did not reach me in time to forward it to California before the adjournment of the Legislature. Extracts from the opinion were furnished to the two distinguished Senators from California who manifested much interest in having these important works completed.

I learn, however, that the intelligence did not reach California until the Legislature had adjourned. I appreciate the great importance of a Navy Yard to California and to the commerce of the Pacific. I regret that under the opinion of the Attorney (the clearness and force of which will strike you) the law will not allow me to commence these works until some action on the part of your State Legislature.

I therefore request your Excellency, at the earliest practical moment, to invite the attention of the Legislature to this subject in order that proper Acts may be passed ceding jurisdiction and relinquishing title to Mare Island.

When these difficulties are removed I shall be pleased to have early information of the same to

the end that I may at once proceed to expend this appropriation for the purposes contemplated by the Act of Congress.

I have the honor to be

Very respectfully,
Your obedt Servt

I. C. DOBBIN.

His Excellency
JOHN BIGLER
Governor of California
San Francisco, Cala.

The above is written under the impression that no act of cession has been passed by the Legislature of California. Should however such an act have been passed will you be good enough to have the Department furnished with an official copy. I. C. D.

(Copy)

Attorney General's Office

April 9th 1853.

Sir,

I have received your communication of this date, the question presented by which will appear by what follows:

The Act of March 3rd 1853, making appropriations for the Naval Service for the next fiscal year, appropriates the sum of One hundred Thousand Dollars towards certain objects of Construction at the Navy Yard in San Francisco, provided, that before this sum shall be expended, the Attorney Gen-

eral of the United States shall decide that the United States have good title to the land upon which the buildings are to be erected.

As there was already permanent provision by law, requiring that no public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon Navy Yards, or other public buildings of any kind whatever, until the Attorney General shall have passed on the title, it is to be assumed that Congress had some special reasons for making the specific enactment recited.

The probable reasons for this may be gathered from the documents accompanying your letter and from other sources.

In the Act of August 31st, 1852, making appropriations for the Naval Service there is an appropriation of One hundred Thousand dollars, for the commencement of a Navy Yard in the Bay of San Francisco, either by purchase, or by reservation of public lands.

In the execution of the law, the Secretary of the Navy, it seems, selected as the proposed site a tract of land in the Bay of San Francisco, called Isla de la Segna, or Mare Island, which land being subject to certain private claims, the question of title was of course submitted to the Attorney General.

The opinion of the Attorney General upon the facts and documents presented to him, is to the effect that Mare Island is public domain of the United States, subject, however, to adverse claims,

derived from one Victor Castro, who alleges title by grant from the Mexican Government, anterior to the conquest of California, by the United States.

Without absolutely deciding on the validity of this claim, which in fact depends on the proceedings now pending under the provisions of March 3rd 1853 and August 31st 1852, for the settlement of private land claims in California, and could not now be decided by him, it being still sub-judice, the Attorney General (Mr. Crittenden) came to the conclusion that there was so much of colorable, or at least, possible grounds for the Castro claim, as to justify the payment of a large sum of money by the United States to silence and extinguish it, which, it seems, has accordingly been done.

What Mr. Crittenden really passed upon, therefore, was the chain of title vesting in the United States by conveying in the nature of quit-claims, all the interest, whatever it might be, of Victor Castro and authorizing the payment by the Secretary of the Navy of the sum of public money requisite for the purpose of purchasing up that claim, which is yet to be finally adjudicated by the Courts of the United States.

Mr. Crittenden also expresses the opinion that no individual except Castro, or his grantees had or could have, good claim as against the United States, in which view of the subject, the final decision in the pending case of Castro against the United States would be no otherwise material than as, if in favor of Castro, it would then dispose of any

other dormant private claims adverse to the general title of the Government.

But this conclusion must be limited to the question of claims of a date anterior to the conquest of California. It cannot exclude any adverse claim originating at a date subsequent to the conquest, such as that set up by one Henry Sandford, and which Mr. Crittenden assumes to be disposed of by the superior adverse claims of the grantees of Victor Castro.

The grounds of Sandfords claim do not appear in the papers submitted to me, and I cannot without further information, express my opinion regarding it, except to say that I do not think it safe to rely on that of Victor Castro as a complete answer to it.

The Castro claim, as already explained, [illegible] litigation in a suit against the United States, commenced before the California Land Claim Commissioners, and it is impossible to know before hand what may be the decision of the Supreme Court of the United States in the case when it shall be heard on appeal. It involves difficult and important questions of law, which the commissioners, to be sure, have decided in favor of the claimants, but which the Supreme Court may decide otherwise. What the United States got by the purchase from Castro's grantees, is a disputed claim, which may or may not be settled in favor of Castro by the Supreme Court.

True, the United States may decline to resist the claim of Castro in the pending suit, and by

consent or by omission to enter an appeal, may in fact take the side of the adversary party, his claim being vested in them, and allow a final judgment to be entered affirming the grant to Castro. But I, as Attorney General in view of the special duties imposed on me by the Acts for the settlement of private land claims in California, and of my general obligation to look after the rights of the United States in the premises, cannot pursue this course.

I must not admit that the purchase of the Castro claim by the United States operates in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro. I must, and do, in behalf of the United States, utterly reject this idea.

Where the transcript of the case of Castro's grantees against the United States comes to me in conformity with the provisions of law, I shall as of course, in deference to the plainest dictates of public duty, carry it by appeal before the Supreme Court, for the obvious reason that the case is not an isolated one, and that if the question of law involved in it be decided in favor of the claimants, the decision takes from the United States I know not how many millions worth of land in California which is otherwise public domain.

Confirmation by the Commissioners or the purchase by the United States, of the claim of Castro, may perhaps, as intimated by Mr. Crittenden, be

taken as supplying that defect in Castro's title which consists of the want of the assent, required by the Mexican law, of the Departmental Deputation; but it cannot supply other and much more serious desiderata in the title, the decision of which remains for the Supreme Court.

In addition to which it is to be considered that whatever might be the legal effect by way of waiver, estoppel or otherwise, of any transaction in the premises, between Castro's grantees and the United States, probably no such transaction could affect the rights of Sandford, or any other adverse claimants, save the grantees of Castro—Sandford or any other person may not be precluded by anything the United States can do, from setting up a claim better than Castro's, that is denying the validity of the original grant to Castro, and so ousting the United States.

Assuming, therefore, that the grant to Castro, though it be the only adverse claim of date anterior to the acquisition of California, yet is no sufficient answer to any claim of origin subsequent to that date, we now arrive at a new class of considerations material to be discussed and weighed.

The late Secretary of the Navy, it seems, in proper solicitude to explore this matter thoroughly, called upon Mr. Cooley, the Law Agent representing the United States before the California Land Claim Commissioners, for his opinion as to the tile of Mare Island, which opinion is among the papers filed, and is entitled to consideration.

Following up the suggestion of inquiry made by Mr. Cooley, I am satisfied that the State of California may set up, and probably maintain title as against the United States to so much of Mare Island as is subject to overflow by water, whether periodically or otherwise, that is, at least to all below high water mark——.

In the first place, the Supreme Court has decided in the case of Pollard vs. Hagan 3 Howard, 212, that the shores of navigable waters and the soil under them, were not granted by the constitution to the United States, but were reserved to the States respectively, and the new States have the same rights, sovereignty and jurisdiction over this subject as the original States. This decision has been re-examined, and more than once re-affirmed by the Supreme Court—See Goodrich vs. Kibble, 9 Howard, 471 & 477 and Doe vs. Beebe et al 13 Howard 25—It is immaterial under these decisions, whether the general sovereignty of the United States and their right of domain, came by treaty with a foreign Power, or otherwise.

In all cases, on the admission of any State into the Union, the land of the shores below high water mark passes to and vests In that State by virtue of the constitution.

In the second place, by an Act of Congress passed the 20th day of September 1850, all the swamp and other overflowed lands in the State of Arkansas, made thereby unfit for cultivation, are granted to said State, and then the provisions of the Act are

extended to, and its benefits conferred upon, each of the other States of the Union, in which such swamp and overflowed lands may be situated. The State of California had already, by Act of September 9th 1850, been admitted into the Union, and is, of course, entitled to all the uncultivated overflowed lands within its limits as against the United States.

It seems to me, that on one, or both of these grounds, the State of California may lay claim to all that part of Mare Island, which is not above high water mark, and which is just as necessary as the upland nay, more necessary, for the purposes of a Navy Yard—It will not avail anything for the United States to acquire the upland, unless it may construct wharves and docks which must of course be situated on this very overflowed or tide water shore lands. Nay, how can the United States enjoy the use of Mare Island as a Naval Depot, while its entire shore belongs to the State of California, whose rights of property may shut up the Island against all access of ships as effectually as if it were surrounded by a wall of granite.

There is another class of questions suggested by Mr. Cooley, concerning which there is not sufficient information, in the document before me, to enable me to form any satisfactory judgment, and that is, the possibility of an adverse title to some part of Mare Island having been acquired by any individual since the conquest and cession of California. I suppose a proper investigation of the claim of

Henry Sandford would afford, or lead to, the requisite information as to this general head, of inquiry into the title, without possessing which I can give no opinion on the subject.

I recommend therefore, as indispensable prerequisites to any lawful expenditure of public money on Mare Island.

First.—that due investigation be had, through the District Attorney for the Northern District of California, or otherwise into the claim of Henry Sandford, and any other ground of individual claim of date subsequent to the Conquest.

Secondly.—that the State of California be invited to relinquish to the United States whatever claim, if any, she may have, to the shores or the overflowed lands of Mare Island.

I have the honor to be

Very respectfully,

C. CUSHING.

HON. JAS. C. DOBBIN
Secry. of the Navy.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. Deft. Exhibit 40. Fld. June 15, 37. W. B. Maling, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.

DEFENDANTS' EXHIBIT 45

A. O. STEWART
Tenth Floor Insurance Center Building
206 Sansome Street
San Francisco, California

June 15th, 1937.

Judge Warren Olney, Jr.,
Balfour Building,
San Francisco, California.
Re: United States vs. Mary W. Stewart et al.

Dear Judge Olney:

In response to your inquiry concerning the property which was acquired by Mrs. Stewart on Cross Island in Solano County, I wish to state as follows:

The lands which Mrs. Stewart purchased were purchased on July 27th, 1928 for the sum of $18,013.35. These lands are more particularly described as follows:

> All that portion of the West Half of Section 31, Township 4 North, Range 4 West, lying South of South Slough and within Solano County, also
>
> The fractional West Half of Section 6, Township 3 North, Range 4 West, lying within the boundary of Swamp and Overflow Lands No. 569, said parcels being a portion of Swamp and Overflow Lands Survey No. 569, and situated on Cross Island.

Excepting therefrom 6.82 acres, more or less, conveyed to the Sears Point Toll Road Company.

During the year 1929 Mrs. Stewart placed improvements upon the land consisting of levees, drainage and irrigation gates at a total cost of $11,550.00.

I trust that this information is what you wish.

Very truly yours,

A. O. STEWART

AOS:MMcD

[Endorsed]: U. S. District Court SF U S vs Stewart No. 2685 Deft. Exhibit 45. Fld June 16, 37 W. B. Maling, Clerk.

[Endorsed]: No. 9507 United States Circuit Court of Appeals for the Ninth Circuit Filed Apr 29 1940 Paul P. O'Brien Clerk

Certified Copy of Judgment Roll and Mandate

In the Superior Court of Solano County,
State of California

3140

THE SAN FRANCISCO SAVINGS UNION, THE BANK OF CALIFORNIA and GEORGE A. NOURSE,

Plaintiffs,

vs.

JOHN IRWIN,

Defendant.

COMPLAINT

The plaintiffs in the above entitled action in their complaint say,

I.

That the plaintiff the San Francisco Savings Union is and at, and during all the times hereinafter mentioned was a corporation duly incorporated under the laws of the State of California.

II.

That the plaintiff the Bank of California is and at, and during all the times hereinafter mentioned was a corporation duly incorporated under the laws of the State of California.

III.

That the plaintiff herein the said San Francisco Savings Union, the said Bank of California and

George A. Nourse, are the owners and seized in fee as tenants in common of the following described tract of land, towit; beginning at a stake on the west bank of Napa Bay 72 chains due west from the North East corner of section thirty four (34) in Township 4, North, Range 4 West, M. D. M. according to the U. S. Government survey, thence running due west, 328 chains to a stake on the South bank of Huichica Creek; thence along said bank as follows: North 83 3/4° West 35 chains, North 75° W 42 50/100 chains, South 80 1/4° West 39 chains, South 60° West 17.50 chains, South 55° West 11 50/100 chains, South 22° West 13.50 chains to the County line between the Counties of Solano, and Napa, South 4° West 10 70/100 chains to San Pablo Bay, thence along the shore line of said Bay South 44 3/4° East, 15.10 chains South 67° East, 38.10 chains, South 75° East 42.80 chains, South 61° East 76.30 chains South 63 3/4° East 42.80 chains, South 69° 10′ East 61 chains, South 67° 40′ East 63.87 chains, South 68 1/4° East 57.20 chains, South 65° 21′ East 45.20 chains, South 66 1/4° East 68 chains South 80° East 40.50 chains to the West line of Swamp and Overflowed Land Survey No. 34 of Solano County, in the State of California. Thence north along said line 22.33 chains to its North West corner, thence East along the north line of said survey 30 chains to the shore of Napa Bay, thence along said shore North 12 3/4° West 20.30 chains to the mouth of "Dutchmans Slough" commonly

so called, thence North 2 1/4° West 85 chains to South Slough commonly, so called thence North 34 1/4° West 12 chains; thence North 75°. West 17 chains North 25° West, 43 chains, North 12 1/2° West 63.50 chains to the place of beginning, all said lines being run by the true meridian Magnetic, Variation 16° 25′ East, and said land being the same embraced in Swamp and Overflowed Land Survey No. 569 of said Solano County and described in a patent issued by the State of California to John W. Pearson, as patentee, bearing date April 7, 1874 and recorded at pages 301 and following of Liber 3 of Patents in the office of the County Recorder of the County of Solano, State of California.

IV.

That a portion of said land is situated in Solano County, and the remaining portion thereof in Napa County both in the State of California.

V.

That the defendant John Irwin, is in possession of said land, and excludes these plaintiffs thereof.

Wherefore these plaintiffs pray judgment against said defendant for recovery of the possession of said land, and for the costs of this action.

GEO. A. NOURSE

In propria persona and Attorney for the defendants The San Francisco Savings Union and the Bank of California.

State of California,
City and County of San Francisco—ss.

Lovell White being duly sworn, says, that he is the Secretary of the San Francisco Savings Union one of the plaintiffs in the above entitled action that he has heard read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowldege except as to the matters which are therein stated on his information or belief and as to these matters that he believes it to be true.

LOVELL WHITE

Subscribed and Sworn to before me this twelfth day of September 1883.

[Seal] ANDREW J. COFFEE,
Notary Public.

[Indorsed]: No. 418. Superior Court, County of Solano. The San Francisco Savings Union, et al., Plaintiffs, vs. John Irwin, Defendant. "Complaint". Filed Sept. 13th, 1883. W. J. Costigan, Clk. Geo. A. Nourse, Attorney for Plaintiffs.

[Title of Superior Court and Cause.]

The People of the State of California Send Greeting to John Irwin, Defendant.

You are hereby required to appear in an action brought against you by the above-named Plaintiffs, in the Superior Court of the County of Solano, State of California, and to answer the Complaint

filed therein, within ten days, (exclusive of the day of service), after the service on you of this summons—if served within this county; or, if served elsewhere within thirty days.

The said action is brought to obtain judgment against you for the recovery of the possession of certain land described in the Complaint in this action (a copy of which complaint accompanies this Summons and is made part hereof) and for the costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said Plaintiffs will apply to the Court for the relief demanded in the complaint.

Given under my hand and the Seal of the Superior Court of the County of Solano, State of California, this 13th day of Sept. in the year of our Lord one thousand eight hundred and eighty three.

[Seal] W. J. COSTIGAN,
Clerk.

By .....,
Deputy Clerk.

Office of the Sheriff
of the
County of Solano

I hereby certify that I received the within Summons on the 13th day of Sept 1883 and personally served the same on the 15th day of Sept, 1883, on John Irwin he being the defendant named in said Summons, by delivering to John Irwin said defend-

ant personally in the County of Solano a copy of said Summons, and a true and correct copy of the complaint in the action named in said summons, attached to said copy of Summons.

Dated this 17th day of Sept 1883

A. KIRBY,
Sheriff.

By .....,
Deputy Sheriff.

GEO. A. NOURSE
in pro per and atty for The San Francisco Savings Union and The Bank of California.

[Endorsed]: Filed Sept 17th 1883 W. J. Costigan Clerk

[Title of Superior Court and Cause.]

It is hereby stipulated and agreed that defendant may have until and including October 10th 1883, in which to plead to plaintiffs Complaint herein.

Dated Sept 21/1883

GEO. A. NOURSE
Atty for Plff
Geo. A. Nourse
In Pro Per

[Endorsed]: No. 418. Superior Court, Solano County, The San Francisco Savings Union et al Plffs vs John Irwin Deft "Stipulation" S. G. Hilborn, Atty for Deft. Filed Sept 22, 1883. W. J. Costigan, Clk.

[Title of Superior Court and Cause.]

On motion of S. G. Hilborn, Esq., Attorney for defendant, It is ordered that said defendant be allowed until the 20th day of October 1883, to answer the Complaint filed herein,

Entered Oct 6th 1883

Office of the County Clerk
of the
County of Solano, State of California—ss.

I, W. J. Costigan, County Clerk of the County of Solano, and ex-officio Clerk of the Superior Court, in and for said County, do hereby certify the within and foregoing to be a full, true and perfect copy of an order made and entered on the minutes of the said Court.

Witness my hand and the seal of said Court, this 6th day of Oct. A. D. 1883.

[Seal] W. J. COSTIGAN,
Clerk.

By .....,
Deputy Clerk.

[Title of Superior Court and Cause.]

Petition of John Irwin, defendant for removal of cause to United States Circuit Court.

The Petition of John Irwin the above named defendant shows to the Court as follows,

The above entitled action was brought in the Superior Court of the County of Solano, State of California, against your petitioner John Irwin, by the filing of a complaint and the issuance and service of a summons and copy of the complaint therein upon your petitioner on the 13th day of September, A. D. 1883.

That your petitioner has not yet filed his answer in said cause but that as to your petitioner said cause is now pending.

That said cause has not been tried and that this is the first term of said Superior Court at which said cause could by any probability be tried.

That said action is an action at law, of a civil nature and that the matter in dispute exceeds the sum or value of five hundred dollars exclusive of costs and arises under the laws of the United States and under the treaties made under their authority.

The action is an action of ejectment brought by the plaintiff to recover from defendant possession of certain lands in Solano County State of California known as a portion of Mare Island and for the value of the use and occupation thereof and damages for its detention.

The Government of the United States among other sources of title claims the title to said lands by purchase in the year 1853 and has been in the exclusive occupancy and possession ever since said purchase using the same as a Government Navy Yard and Naval Station.

That during the period, the Government has occupied said premises, it has placed thereon extensive and valuable improvements consisting of docks, workshops, store houses, hospital, a lighthouse and other establishments suitable for a naval station and that the United States has expended in constructing said improvements on said lands several million of dollars.

The the defendant John Irwin is an officer in the United States Navy duly appointed and designated by the Secretary of the Navy as commandant of said Mare Island Navy Yard and as such and not otherwise he is and was at the commencement of this action in possession of said described premises for the United States and not for himself and that he never had or claimed to have any interest therein as owner, tenant or otherwise and that from 1853 down to the present time the said United States has continuously been and still is the owner in fee and in the sole and exclusive possession of said described premises and every part thereof. That the property sued for in this action and described in the complaint herein was granted by the Mexican Government to Victor Castro.

That W. H. Aspinwall and G. W. P. Bissell by certain mesne conveyances acquired the title of said Castro to said land and while so the owner presented their said claim to the Board of Land Commissioners appointed to adjudicate the private land claims in California under the Act of Congress of March 3, 1851, entitled "An Act to ascertain and settle the

private land claims in the State of California," and such proceedings were had before said Board of Commissioners that their said title was confirmed on the 8th day of May, 1855.

That afterwards the said title of said Bissell and Aspinwall was confirmed by the Honorable District Court of the United States for the Northern District of California by decree filed March 2, 1857.

That on the 4th day of January, 1853, the said Aspinwall and Bissell for a valuable consideration, viz; $80,000.00 sold and conveyed said land to the United States and executed a proper deed of conveyance for the same, duly acknowledged and the grantee went into possession of said lands under said deed and has so continued to occupy the same ever since.

That on the 11th day of February, 1853, Millard Filmore, President of the United States by virtue of the authority in him vested by the constitution and laws of the United States, issued his proclamation in due form reserving the lands in controversy for the sole use of the United States and declaring the same to be a reservation for government purposes and uses.

Your petitioner claims that this action arises under the laws of the United States, and the treaties made under their authority and states the following questions which among others will necessarily arise and require adjudication in the trial of the action.

First, the petitioner will claim from the facts in the case that the confirmation of the grant or the

petition of Bissell and Aspinwall gave to the said petitioners a perfect title to said lands without any further proceedings, and that the United States acquired and now holds said title.

Second, that neither the plaintiffs nor their grantors have ever presented their pretended claim to said land in controversy, to the Commissioners within the time limited by the Act of Congress entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3rd, 1851, and the various acts amendatory thereof, and that by the terms of said Act and said amendatory acts, their claim thereto if any they ever had, lapsed, and that by their failure to present said claim they must be deemed to have abandoned the same.

Third, the question will also arise and must be determined by the Court trying said action what are the rights of the confirmers, under a grant from the Mexican Government as against a "third person," and especially against, persons who have failed to present their claim to the Commissioners for confirmation.

Fourth, the question will also arise and must be determined by the Court in the trial of this action who are to be deemed and regarded as third persons under the Act of March 3rd, 1851, above quoted, and whether the plaintiffs are to be regarded as such "third persons."

Fifth, the question will arise and must be determined by the Court how far and to what extent the

Statutes of Limitations may be set up in behalf of the United States holding title to lands derived from the confirmers of a grant as against persons claiming who have failed and neglected to present claim to the Land Commissioners for confirmation.

Sixth, the question will arise and must be determined by the Court in trial of this cause as to what was the effect of the proclamation of the President of the United States reserving the lands in question from sale and declaring the same to be a reservation for Government use.

Seventh, that the property in controversy in this suit has been for more than thirty years and now is held, occupied and possessed, by the United States through its officers and agents charged on behalf of the government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States for public uses in the exercise of their sovereign and constitutional powers, as a Navy Yard and Naval Station for the construction and repair of vessels of the Navy of the United States, and there is also established and maintained thereon a Lighthouse and also Naval Hospital for sick and disabled officers and seamen of the Navy.

Wherefore the petitioner will claim and insist that the Courts have no jurisdiction of the subject of this controversy and will move that the complaint herein be set aside and all the proceedings be stayed and said action dismissed.

And the said defendant John Irwin, hereby offers John A. Innis of the City of Vallejo State of Cali-

fornia and James McCudden, of the City of Vallejo State of California, as sureties for his entering in the Circuit Court of the United States Ninth Circuit in and for the District of California, wherein said suit is pending on the first day of the next session of said Court or before, a copy of the record in said suit, and for paying all costs that may be awarded by said Circuit Court if said Court should hold that said suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in such suit, if special bail was originally required therein, and for his complying in all respects with the provisions in the premises of the Act of Congress of the United States, passed March 3rd, 1875, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of cause from State Court and for other purposes."

Wherefore said defendant John Irwin prays this Honorable Court that said case be removed into the Circuit Court of the United States Ninth Circuit, District of California, and that this Court proceed no further in the premises.

JOHN IRWIN
S. G. HILBORN
Attorney for Defendant
John Irwin.

State of California,
County of Solano—ss.

John Irwin being duly sworn, deposes and says, that he is the above named petitioner in the above

entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN IRWIN.

Subscribed and sworn to before me this third day of October, 1883.

[Seal] JOHN BROWNLIE,
Notary Public.

[Indorsed]: No. 418, Superior Court, Solano County, The San Francisco Savings Union et al Plaintiffs, vs. John Irwin, Defendant. "Petition for removal of cause to U. S. Circuit Court, District of California." Filed Oct. 6th 1883, W. J. Costigan, Clerk. S. G. Hilborn, attorney for Defendant.

[Title of Superior Court and Cause.]

Know all men by these presents, that I John Irwin, a citizen and resident of the State of California as principal and John A. McInnis and James McCudden, of the City of Vallejo, State of California as sureties, are jointly and severally held and firmly bound unto The San Francisco Savings Union (a corporation) The Bank of California (a corporation) and George A. Nourse in the sum of Five hundred dollars, for which well and

truly to be paid unto the said San Francisco Savings Union (a corporation) Bank of California (a corporation) and George A. Nourse, their heirs executors, administrators and assigns we bind ourselves our heirs, executors, administrators successors and assigns firmly by these presents.

Sealed with our seals and dated this third day of October 1883.

The condition of this obligation is such that if the said John Irwin, the defendant in a suit now pending in this Court shall enter into the Circuit Court of the United States for the Ninth Circuit District of California, on the first day of the next session thereof, a copy of the record in said suit, and shall pay all costs that may be awarded by said Circuit Court, if the said Court shall hold that said suit was wrongfully and improperly removed thereto, and shall also then appear and enter special bail in said suit, if special bail be required therein, and shall enter appearance of said John Irwin in said Court then this obligation to be void, and otherwise to remain in full force and effect.

In witness whereof the said obligors have hereunto set their hands and seals this third day of October A. D. 1883.

JOHN IRWIN (L.S.)
J. S. McINNIS (L.S.)
JAMES McCUDDEN (L.S.)

State of California,
County of Solano—ss.

John A. McInnis and James McCudden, of said County the sureties named in the foregoing undertaking being severally duly sworn do each for himself depose and say that he is a resident of the State of California and a property holder therein and is worth sum of five hundred dollars over and above his just debts and liabilities and exclusive of property by law exempt from execution and that he has property in the State of California liable to execution of the value of more than five hundred dollars.

J. S. McINNIS,
JAMES McCUDDEN.

Subscribed and sworn to before me this third day of October A. D. 1883.

[Seal] JOHN BROWNLIE,
Notary Public.

[Indorsed]: The within Bond is hereby approved this 6th day of October, 1883.

JNO. M. GREGORY,
Judge of the Superior Court
Solano Co., Cal.

[Title of Superior Court and Cause.]

Bond on transfer of case to U. S. Circuit Court
Filed Oct. 6th, 1883.

W. J. COSTIGAN,
Clk.

S. G. HILBORN,
United States Attorney
Attorney for Defendant.

[Title of Superior Court and Cause.]

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant John Irwin, under the provisions of an Act of Congress of the United States, passed March 3rd, 1875, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts and for other purposes" and on motion of S. G. Hilborn, Esq., of Counsel for defendant, it is ordered that the security offered by the said defendant be approved; and that this Court proceed no further in this cause and that this cause be removed into the Circuit Court of the United States for the Ninth Circuit, State of California.

Dated this 6th day of October A. D. 1883.

JNO. M. GREGORY,
Judge.

[Indorsed]: No. 418, Superior Court, County of Solano. The San Francisco Savings Union et al. Plaintiffs vs. John Irwin Defendant. "Order of Removal of Cause to U. S. Circuit Court", Filed & entered Oct. 6th, 1883. W. J. Costigan, Clk. S. G. Hilborn, Attorney for Defendant.

State of California,
County of Solano—ss.

I, W. J. Costigan, County Clerk of the County of Solano, State of California and ex officio Clerk of the Superior Court of said County, do hereby certify the foregoing to be a full, true and correct copy of the whole of the record in the within entitled action of "The San Francisco Savings Union, et al., vs. John Irwin", now on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court this 8th day of October, 1883.

[Seal] W. J. COSTIGAN,
Clerk.

[Endorsed]: No. 3140. U. S. Circuit Court Cal San Francisco Savings Union et al v John Irwin.

Transferred Record Filed October 9, 1883.

L. S. B. SAWYER,
Clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, State of California

THE SAN FRANCISCO SAVINGS UNION
THE BANK OF CALIFORNIA and
GEORGE A. NOURSE,

Plaintiffs,

vs.

JOHN IRWIN,

Defendant.

The Answer of John Irwin, the defendant to the Complaint of The San Francisco Savings Union, The Bank of California and George A. Nourse.

The defendant now and at all times hereafter saving and reserving unto himself all benfit and advantage of exception which can or may be had or taken to the many uncertainties and imperfections in the said complaint contained; for answer thereunto saith:

He denies that the plaintiffs or either of them are now or ever have been the owners or seized in fee or otherwise as tenants in common or otherwise, of the tract of land described in said Complaint or of any part a portion thereof.

And the defendant further answering, says that the premises and property mentioned and described in said Complaint, has been for more than thirty years last past, and now is held, occupied and possessed by the United States through its officers and

agents charged in behalf of the Government of the United States with the Control of said property, and who are in the actual possession thereof, as public property of the United States for public uses in the exercise of their Sovereign and Constitutional power, and that said land and property is a part of "Mare Island" and that on said "Mare Island," there is, and for more than thirty years last past has been a Navy Yard, and Naval Station, for the Constructions and repair of vessels of the Navy of the United States, and there is also established and maintained thereon a light house and also a Naval Hospital for sick and disabled officers and seamen of the Navy of the United States. The said property is known as and called Mare Island Navy Yard.

And the defendant further answering says. That he is an officer in the United States Navy, duly appointed and Commissioned, and prior to the commencement of this action was designated by the Secretary of the Navy, as Commandant of said Mare Island Navy Yard.

And as such Commandant and not otherwise he was at the commencement of this suit and still is in possession of said described premises and property of the United States and not for himself, and that he never had or claimed to have any interest in or to said property or any part thereof, as owner tenant or otherwise, and that from A. D. 1853, down to the present time the United States has continuously been and still is the owner in fee and in the

sole and exclusive possession of said premises described in plaintiff's complaint and of every part thereof.

And further answering the defendant says. The United States by and through its officers and agents has been in the adverse exclusive continued and uninterrupted possession and actual occupation of said land and premises under claim of title, exclusive of other right for more than five years immediately preceeding the commencement of this action.

And further answering the defendant says. That the premises and property sued for in this action, and described in plaintiff's complaint herein, was granted by the Mexican Government to Victor Castro—That W. H. Aspinwall, and G. W. P. Bissell, by certain mesne conveyances acquired the title of said Victor Castro, to said land, premises and property, and while so the owners presented their said claim to the Board of Land Commissioners appointed to adjudicate the private land claims in California under the Act of Congress of March 3rd A D 1851, entitled "An Act to ascertain and settle the private land claims in the State of California," and such proceedings were had before said Board of Commissioners that their said title was confirmed on the 8th day of May A D 1855.

That afterwards the said title of the said Aspinwall and Bissell was confirmed by the Honorable District Court of the United States for the Northern District of California by decree filed March 2nd A D 1857.

That on the 4th day of January A D 1853, the said Aspinwall and Bissell for a valuable consideration, viz: Eighty Thousand Dollars, sold and conveyed said lands to the United States, and executed a proper deed of conveyance for the same duly acknowledged, and the United States as such grantee then went into possession of said lands and premises under said deed, and has so continued to occupy the same and every part thereof ever since said 4th day of January, A. D. 1853.

That the land and premises described in the plaintiffs complaint herein, is a part and portion of the said land and premises purchased by the United States from the said Aspinwall and Bissell as aforesaid.

That on the 11th day of February A. D. 1853, Millard Filmore, President of the United States, by virtue of the Authority in him vested by the Constitution and laws of the United States, issued a proclamation in due form reserving the lands in controversy, together with other lands adjacent thereto, for the sole use of the United States, and declaring the same to be a reservation for Government purposes and uses——

And further answering the defendant says. That the State of California never did possess the legal title to the land and premises described in the said plaintiffs complaint herein, nor to any part or portion thereof.

That the State of California never did have legal right or authority to sell or convey said land or any part or portion thereof to John W. Pearson the

alleged patentee thereof—or to any other person or persons whomsoever——

That the pretended patent described and referred to in plaintiffs complaint—if the same was ever issued to said John W. Pearson by the State of California—was illegally issued—and the same is invalid and of no effect in law——

That the State of California never had legal right to execute or issue a patent for said land or any part thereof——

And further answering the defendant says. That the Court here ought not to take cognizance of or sustain this action, because he says that it does not appear, nor is it a fact that the plaintiffs or either of them, or their ancestors or predecessors or grantors were seized or possessed of the premises or property described in the complaint or any part thereof within five years before the commencement of this action.

And the defendant further answering says, That the Court here ought not to take cognizance of or sustain this action, because he says, the said cause of action, if any there be, is barred by the provisions of Sections 318, and 319, of the Code of Civil Procedure of the State of California.

And the said defendant further answering denies that said plaintiffs are or that either of them is entitled to the relief or any part thereof in said complaint demanded.

And the defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said complaint.

And the defendant further prays that the plaintiffs take nothing by their suit, and that he may be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. G. HILBORN,
Attorney for Defendant.

State of California,
County of Solano—ss.

John Irwin being duly sworn, says, that he is the defendant in the above entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JOHN IRWIN.

Subscribed and sworn to before me this 26th day of October A. D. 1883.

[Seal] JOHN BROWNLIE,
Notary Public

Due service of within Answer and receipt of a copy thereof is admitted this 29th day of October, 1883.

GEO. A. NOURSE,
In pro. pers. and as Atty. for Plffs. Bank of Cala and S. F. Savings Union.

[Endorsed]: Answer filed Oct. 29th, 1883. L. S. B. Sawyer, Clerk.

[Title of Circuit Court of Appeals and Cause.]

It is hereby stipulated between the respective parties to the above suit that the jury be waived and that the same shall be tried by the Court without a jury. That the suit shall be passed from day to day until such time as the same can be heard by the Court.

S. G. HILBORN,
U. S. Attorney
Attorney for Deft.
GEO. A. NOURSE
Atty for Pl'ffs

[Endorsed]: Filed December 15, 1884. L. S. B. Sawyer, Clerk. By F. D. Moncton, Deputy Clerk.

[Title of Circuit Court of Appeals and Cause.]

Comes now said defendant John Irwin, and leave having been first granted by said Court, amends his answer now on file in said cause by inserting therein, after the word "California" in line 13 of page 5, the following:

Further answering said defendant says that the cause of action stated in said plaintiffs complaint, for the recovery of the possession of said premises therein described, or any part thereof, is barred by the provisions of section three hundred and eigh-

teen (318) of the Code of Civil Procedure of said state.

S. G. HILBORN,
U. S. Dist Atty & Atty for Defendants.
A. L. RHODES,
Special Asst. Atty for the U. S. & Atty for Defts.

State of California,
City & County of San Francisco—ss.

John Irwin being first duly sworn deposes and says that he is the defendant in the above entitled action: that he has read the foregoing amendment to the foregoing amendment to the answer in said cause and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN IRWIN.

Subscribed and sworn to before me this 9th day of January, 1885.

L. S. B. SAWYER,
Comr. U. S. Cir't Court
Dist Cal.

State of California,
City & County of San Francisco—ss.

William P. Lawlor being duly sworn deposes and says that he is a citizen of the United States

over the age of twenty-five years: that he served the within and foregoing amendment on George A. Nourse the attorney for the plaintiff in the within entitled cause by depositing a copy thereof in the United States post office in this City with the postage thereon prepaid, addressed to the said Nourse at his place of residence, to wit: Merced in said State of California. And further saith not.

W. P. LAWLOR.

Subscribed and sworn to before me this 21st day of January, 1885.

L. S. B. SAWYER,
Comr. U. S. Cirt. Court
Dist Cal

[Endorsed]: Amendment to Answer filed Jan'y 21, 1885. L. S. B. Sawyer, Clerk.

[Title of Circuit Court of Appeals and Cause.]

The issues of fact in this action having been tried by the court without the intervention of a jury, the attorneys of record of the parties having filed a stipulation in writing with the clerk waiving a jury, and the testimony produced by the respective parties having been heard and considered with the argument of counsel thereon, and due deliberation having been had, the court finds for the plaintiffs on all the issues of fact in the action and against the defendant. And as a conclusion of law therefrom, the

court finds that the plaintiffs are entitled to the possession of the lands in controversy as described in the complaint. Judgment, that the plaintiffs recover such possession, will accordingly be entered.

May 31, 1886.

FIELD,
Circuit Justice.
SAWYER,
Circuit Judge.

[Endorsed]: Findings filed July 8, 1886. L. S. B. Sawyer, Clerk.

[Title of Circuit Court of Appeals and Cause.]

This cause having come on regularly for re-trial on the 16 day of July, 1885, being a day in the July Term 1885, of said Court, before the Court sitting without a jury a trial by jury having been waived by Stipulation of Counsel in writing for the respective parties hereto, duly filed with the Clerk of said court. Geo. A. Nourse and S. O. Houghton, Esqs., appearing on behalf of the plaintiffs and S. G. Hilborn, Esq., United States Attorney, Carroll Cook, Esq., Assistant United States Attorney and A. L. Rhodes, Esq., on behalf of the defendant and the trial having been proceeded with on the 16 and 17 days of said July in said year and term and the evidence oral and documentary on behalf of the respective parties having been introduced and closed, the cause after arguments of counsel was submitted to the Court for consideration and

decision and the Court after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance therewith with costs.

Now, therefore, by virtue of the law and by reason of the finding aforesaid it is considered by the Court that The San Francisco Savings Union, The Bank of California and George A. Nourse, plaintiffs, do have and recover of and from John Irwin, defendant, the possession of that certain tract or parcel of land situate in the counties of Solano and Napa State of California and described as follows, to wit: beginning at a stake in the west bank of Napa Bay 72 chains due west from the North East corner of section Thirty-four (34) in Township 4 North Range 4 West M. D. M. according to the U. S. Government survey, thence running due West 328 chains to a stake in the South bank of Huichica Creek, thence along said bank as follows: North 83¾° West 35 chains, North 75° West 42 50/100 chains, South 80¼° West 39 chains, South 60° West 17.50 chains, South 55° West 11 50/100 chains, South 22° West 13.50 chains to the County line between the Counties of Solano and Napa South 4° West 10 70/100 chains to San Pablo Bay, thence along the shore line of said Bay South 44¾° East 15.10 chains South 67° East 38.10 chains, South 75° East 42.80 chains, South 61° East 76.30 chains South 63¾° East 42.80 chains South 69° 10′ East 61 chains, South 67° 40′ East 63.87 chains, South 68¼° East 57.20 chains South 65° 21′ East 45.20 chains South 66¼° East

68 chains South 80° East 40.50 chains to the West line of Swamp and Overflowed Land Survey No. 34 of Solano County, in the State of California. Thence north along said line 22.33 chains to its North west corner. Thence East along the north line of said survey 30 chains to the shore of Napa Bay, thence along said shore North 12¾° West 20.30 chains to the mouth of "Dutchman's Slough," commonly so-called, thence North 2¼° West 85 chains to South Slough commonly so called, thence North 34¼° West 12 chains, thence North 75° West 17 chains North 25° West 43 chains, North 12½" West 63.50 chains to the place of beginning all said lines being run by the true meridian Magnetic Variation 16° 25′ East, and said land being the same embraced in Swamp and Overflowed Land Survey No. 569 of said Solano County and described in a patent issued by the State of California to John W. Pearson, as patentee, bearing date April 7, 1854, and recorded at pages 301 and following of Liber 3 of Patents in the office of the County Recorder of the County of Solano, State of California, together with their costs in this behalf expended taxed at $309.70.

Judgment entered this 8th day of July, 1886.

L. S. B. SAWYER,
Clerk.

A true copy attest, etc.

L. S. B. SAWYER,
Clerk.

[Endorsed]: Filed July 8, 1886. L. S. B. Sawyer, Clerk.

JR No. 4 P. 435

[Title of Circuit Court of Appeals and Cause.]

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the therein entitled action.

Witness my hand and the seal of said Circuit Court, this 8th day of July, A. D. 1886.

[Seal] L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

[Endorsed]: Judgment Roll filed July 8th, 1886. L. S. B. Sawyer, Clerk. By F. D. Monckton, Deputy Clerk.

Recorded Judgment Register Book No. 4 page 435 etc.

United States of America—ss.

The President of the United States of America,

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of California:

[Seal, Supreme Court of the United States]

Greeting:

Whereas, lately in the Circuit Court of the United States for the Northern District of California, be-

fore you, or some of you, in a cause between The San Francisco Savings Union, The Bank of California and George A. Nourse, plaintiffs, and John Irwin, defendant, wherein the judgment of the said Circuit Court, entered in said cause, is in the following words, viz:

"This cause having come on regularly for retrial on the 16th day of July, 1885, being a day in the July term, 1885, of said court, before the court sitting without a jury, a trial by jury having been waived by stipulation of counsel, in writing, for the respective parties hereto, duly filed with the clerk of said court, Geo. A. Nourse and S. O. Houghton, esqs., appearing on behalf of the plaintiffs, and S. G. Hilborn, esq., United States attorney, Carroll Cook, esq., assistant United States attorney, and A. L. Rhodes, esq., on behalf of the defendant, and the trial having been proceeded with on the 16th and 17th days of said July, in said year and term, and the evidence, oral and documentary, on behalf of the respective parties, having been introduced and closed, the cause, after arguments of counsel, was submitted to the court for consideration and decision, and the court, after due deliberation, having filed its finding in writing and ordered that judgment be entered herein in accordance therewith, with costs;

Now, therefore, by virtue of the law and by reason of the finding aforesaid, it is considered by the court that the San Francisco Savings Union, the Bank of California, and George A. Nourse, plain-

tiffs, do have and recover of and from John Irwin, defendant, the possession of that certain tract or parcel of land situate in the counties of Solano and Napa, State of California, and described as follows, to wit: Beginning at a stake in the west bank of the Napa Bay, 72 chains due west from the northeast corner of section thirty-four (34), in township 4 north, range 4 west, M. D. M., according to the U. S. Government survey; thence running due west 328 chains to a stake in the south bank of Huichica Creek; thence along said bank as follows: north 83¾° west, 35 chains; north 75° W. 42 50/100 chains; south 80¼° west, 39 chains; south 60° west, 17.50 chains; south 55° west, 11.50 chains; south 22° west, 13.50 chains, to the county line between the counties of Solano and Napa; south 4° west, 10.70 chains, to San Pablo Bay; thence along the shore line of said bay south 44¾° east, 15.10 chains; south 67° east, 38.10 chains; south 75° east, 42.80 chains; south 61° east, 76.30 chains; south 63¾° east, 42.80 chains; south 69° 10′ east, 61 chains; south 67° 40′ east, 63.87 chains; south 68¼° east, 57.20 chains; south 65° 21′ east, 45.20 chains; south 66¼° east, 68 chains; south 80° east, 40.50 chains, to the west line of swamp and overflowed land, survey No. 34 of Solano County, in the State of California; thence north along said line 22.33 chains to its northwest corner; thence east along the north line of said survey 30 chains, to the shore of Napa Bay; thence along said shore north 12¾° west, 20.30 chains, to the mouth of "Dutchman's Slough," com-

monly so called; thence north 2¼° west, 85 chains, to South Slough, commonly so called; thence north 34¼° west, 12 chains; thence north 75° west, 17 chains; north 25° west, 43 chains; north 12½° west, 63.50 chains, to the place of beginning, all said lines being run by the true meridian, magnetic variation 16° 25′ east, and said land being the same embraced in swamp and overflowed land survey No. 569 of said Solano County, and described in a patent issued by the State of California to John W. Pearson, as patentee, bearing date April 7, 1854, and recorded at pages 301 and following of liber 3 of patents in the office of the county recorder of the county of Solano, State of California, together with their costs in this behalf expended, taxed at $309.70.

Judgment entered this 8th day of July, 1886."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

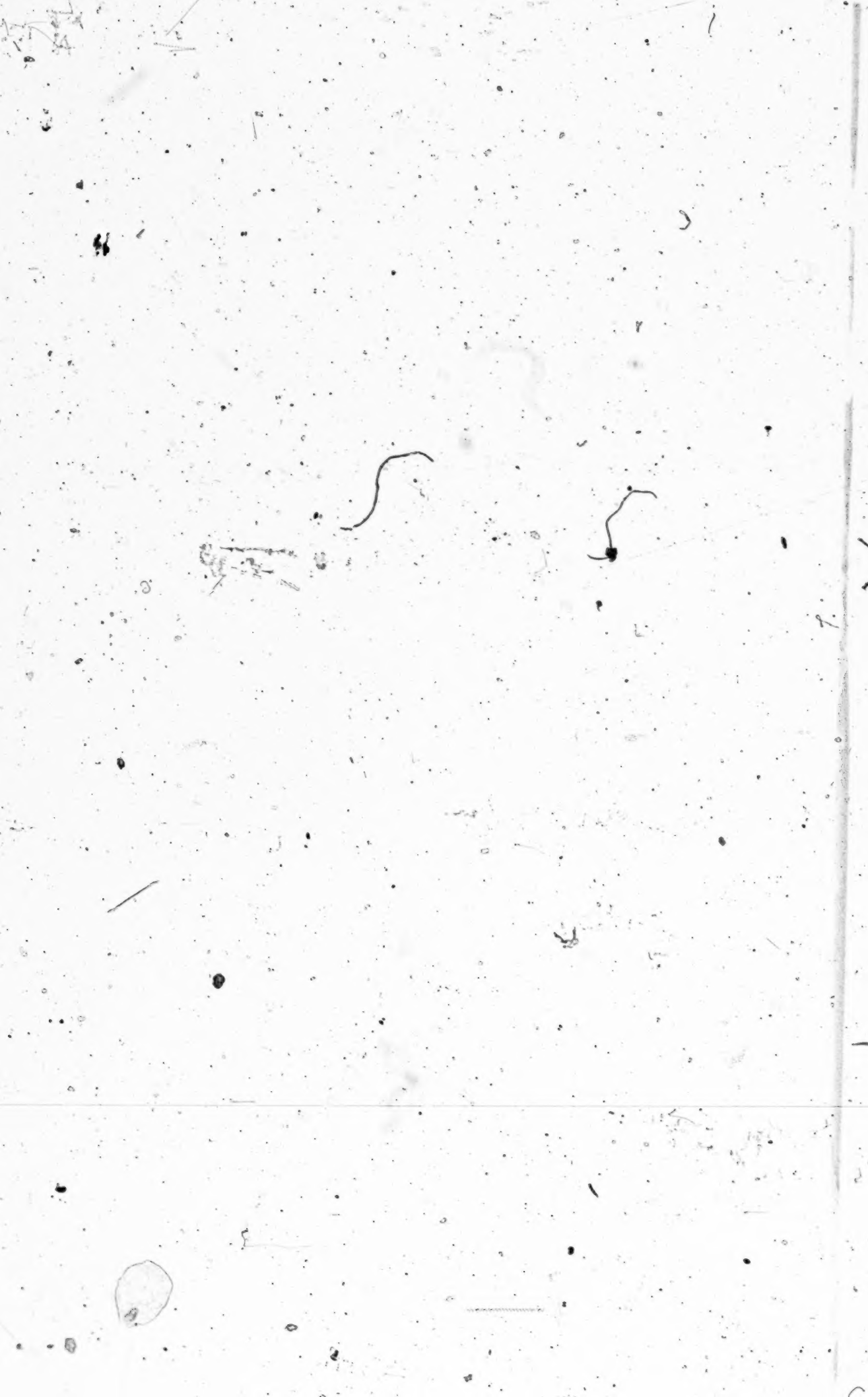
On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby affirmed with costs, and that the said

plaintiffs, The San Francisco Savings Union et al., recover against the said defendant, John Irwin, Thirty-five dollars for their costs herein expended and have execution therefor.

February 3, 1890.

[Endorsed]: Mandate filed & entered August 13, 1891. L. S. B. Sawyer, Clerk.

[Endorsed]: No. 9507. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 29, 1940. Paul P. O'Brien, Clerk.



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Vol. IV

TRANSCRIPT OF RECORD

469281

Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

TRANSCRIPT OF RECORD

In Five Volumes

Supreme Court of the United States

October Term, 1941

No. 848

MARY W. STEWART, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

VOLUME IV

Book of Exhibits

(Pages 1 to 54)

Maps

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9507

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Transcript of Record

In 4 Volumes

VOLUME IV

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Maps

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 70-8-2-40

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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2—Quadrangle map of Mare Island by U. S. G. S., Edition of 1916, reprinted 1927	IV	35
3—Napa Quadrangle, by U. S. G. S., Edition of May, 1902 reprinted in 1932	IV	36
4—Copy of Survey 569	IV	37
5—Pierson Patent—1874	III	185
6—Swamp Land Patent 72, U. S. to California, 1896	III	189
7—Certified copies Swamp Land patents 152; patent numbers 109391	III	192
8—Certified copy patent 937055, U. S. to California	III	196
9—Certified copy of map recorded in Solano County November 10, 1913, map filed pursuant to statute of California referred to in Third Defense	IV	38

	Volume	Page
Exhibits for Defendants (Cont.):		
10—Map showing area of the State of California, published by Coulton & Co. 1855	IV	39
11—Map of Gold Region of California from a recent survey of Robert H. Ellis 1850	IV	40
12—Photostatic copy of map showing Mare Island region issued by the General Land Office, 1886	IV	41
13—Topographical Sketch of the Gold and Quicksilver District of California, July 25, 1848	IV	42
14—Certified copy of Map of 1890 by E. N. Eager	IV	43
15—Certified copy of Map of 1909 by E. N. Eager	IV	45
16—Certified copy of Map of 1925 by E. N. Eager	IV	47
17—Certified copy of Coast Survey chart known as Hilgard Chart of 1884	IV	49
20—Certified copy of Judge Rhodes' appointment as Special U. S. Attorney in Irwin Case	III	203
21—Letter 9/20/86, W. A. Jenks, Acting Attorney General to A. L. Rhodes	III	204

	Volume	Page
Exhibits for Defendants (Cont.):		
22—Franchise, 3/1/26, Solano County to Sears Point Toll Road Co.	III	205
23—Franchise, 4/4/27, Solano County to Sears Point Toll Road Co.	III	210
24—Franchise, 6/4/28, Solano County to Sears Point Toll Road Co.	III	216
25—Franchise, 7/2/28, Solano County to Sears Point Toll Road Co.	III	222
26—Certified copy of Order of Board of Supervisors establishing Reclamation District #186	III	225
27—Letter 10/18/12, Sam'l Adams, First Assistant Secretary Department of Interior to Secretary of the Navy	III	232
28—Letter 2/1/13, Philip Andrews, Acting Secretary Navy Department to Secretary of Interior	III	234
29—Blueprint R-212	IV	50
30—Letter 7/25/79, J. M. Armstrong to Theo. Wagner	III	239

	Volume	Page
Exhibits for Defendants (Cont.):		
31—Letter 8/7/79 from Acting Commissioner to Surveyor General	III	240
32—Letter 8/7/79, Surveyor General to Commissioner General of the Land Office	III	241
33—Hanley protest to Surveyor General July 5, 1879	III	244
34—Hanley protest to Commissioner General of Land Office July 16, 1879	III	251
35—Excerpt from Congressional Record containing excerpt from report of Surveyor General in 1878 which shows sickness and death of Surveyor General Rollins	III	255
36—Letter 2/28/21, from Acting Commissioner to Surveyor General at San Francisco	III	257
37—Decision 28814, entitled Motion for rehearing 8/17/23, E. C. Finney, First Assistant Secretary	III	260
38—Letter of Instruction to make the survey referred to in Defendants' Exhibit 37	III	266

	Volume	Page
Exhibits for Defendants (Cont.):		
39—Circular from Commissioner to Surveyors General in re practice of approval of surveys	III	271
40—Correspondence between Attorney General of United States and Governor of the State of California in re cession of certain swamp and tide lands by the State to United States	III	273
41—Plat of township 3 north range 5 west	IV	51
42—Plat of township 4 north range 5 west	IV	52
43—Plat of township 3 north range 4 west	IV	53
44—Plat of township 4 north range 4 west	IV	54
45—Letter dated June 15, 1937 to Warren Olney, Jr. from A. O. Stewart	III	285
Judgment Roll San Francisco Savings Union v. Irwin	III	287
Exhibits for Plaintiff:		
D-1—Certified copy of transcript in case 311 in Land Commission, U. S. v. Bissell & Aspinwall	V	1

	Volume	Page
Exhibits for Plaintiff (Cont.):		
D-2—Record of same in United States District Court	V	73
D-3—Certified copy of Minute Order	V	140
E-1—Certified copy of Report to Secretary of War and Navy 3/31/50	III	4
E-2—Order made by President Fillmore November 6, 1850	III	11
F-1—Report of Board of Officers 11/6/52 in re selection of site for Navy Yard in San Francisco Bay	III	13
F-2—Plans	IV	1
G —Presidential Reservation with letters attached	III	58
H —Deeds to Mare Island and accompanying records, Sonoma County Records	III	66
K-1—F. W. Beachey Map	IV	3
K-2—Wilkes Map (1844)	IV	4
K-3—Map made by French Naval Officer 1844	IV	5
K-4—Stuart Map, 1849	IV	6
K-5—Gibbs Map 1851	IV	7
K-6—General chart of Farallones and entrance to Bay to San Francisco, Ringgold, 1850	IV	8

	Volume	Page
Exhibits for Plaintiff (Cont.):		
K-7 —Ringgold's Sheet #2	IV	9
L-1 —Hydrographic survey of Mare Island—Bache—1849	IV	10
L-2 —Cutts Topographic Survey, 1851	IV	11
L-5 —Coast & Geodetic chart of Mare Island Straits, 1851	IV	12
L-6 —U. S. C. S. Topographic Survey S. F. Bay and Plane Table Sheet XXII	IV	13
L-8 —Alden's Hydrographic Survey 1856	IV	14
L-9 —Published Chart of 1859	IV	15
L-10—Photographic Copy Coast & Geodetic Survey of Petaluma and Napa Creek 1861	IV	16
L-11—Coast & Geodetic Survey of San Pablo Bay 1863	IV	17
L-14—Photographic copy of topographic re-survey San Pablo Bay, October and November, 1886, by James Lawson, Assistant and P. A. Welker Sub-Asst. U. S. Coast & Geodetic Survey	IV	18

Plaintiff's Exhibit F-2

Plaintiff's Exhibit #-2

PLAN

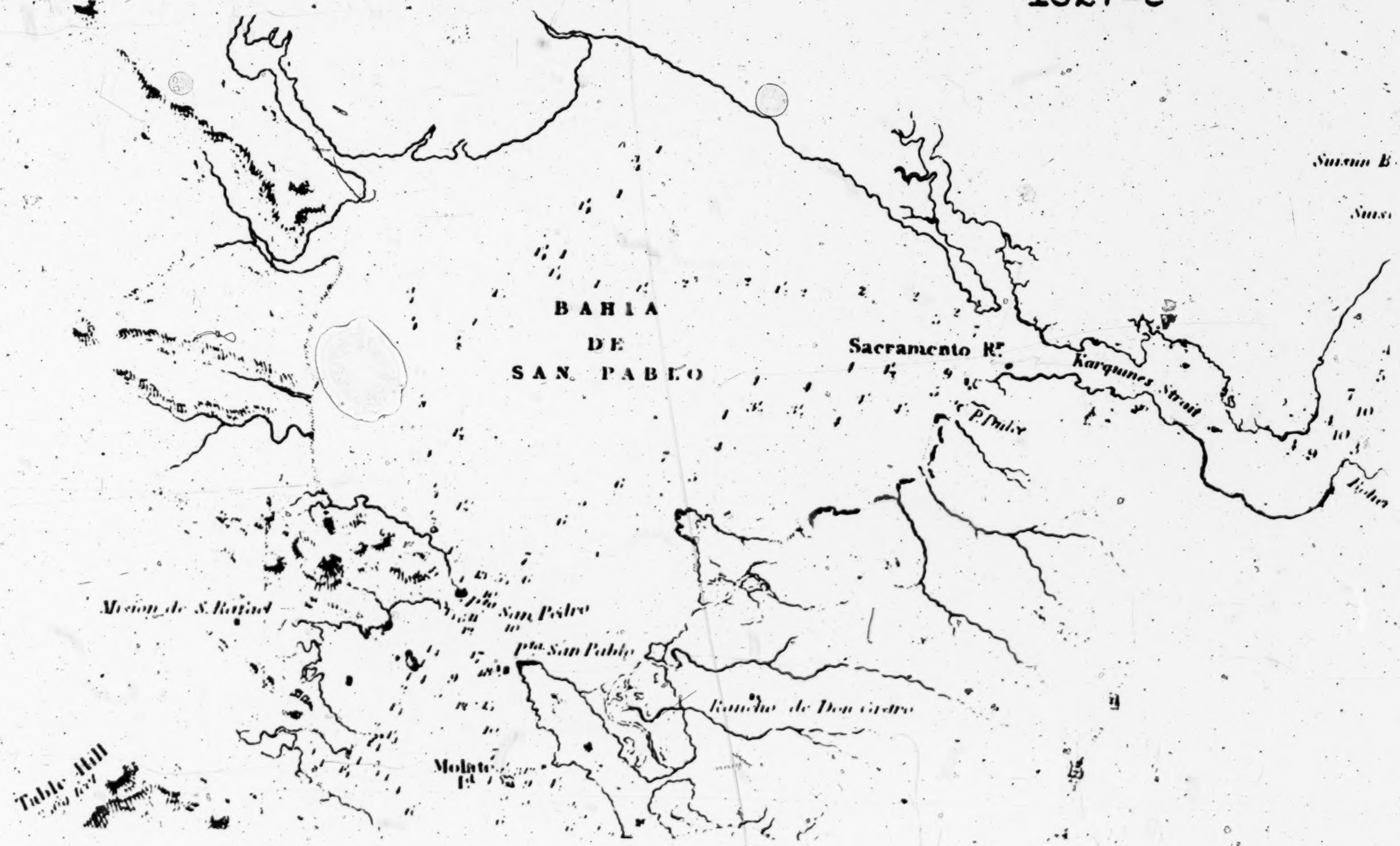
NAVY YARD

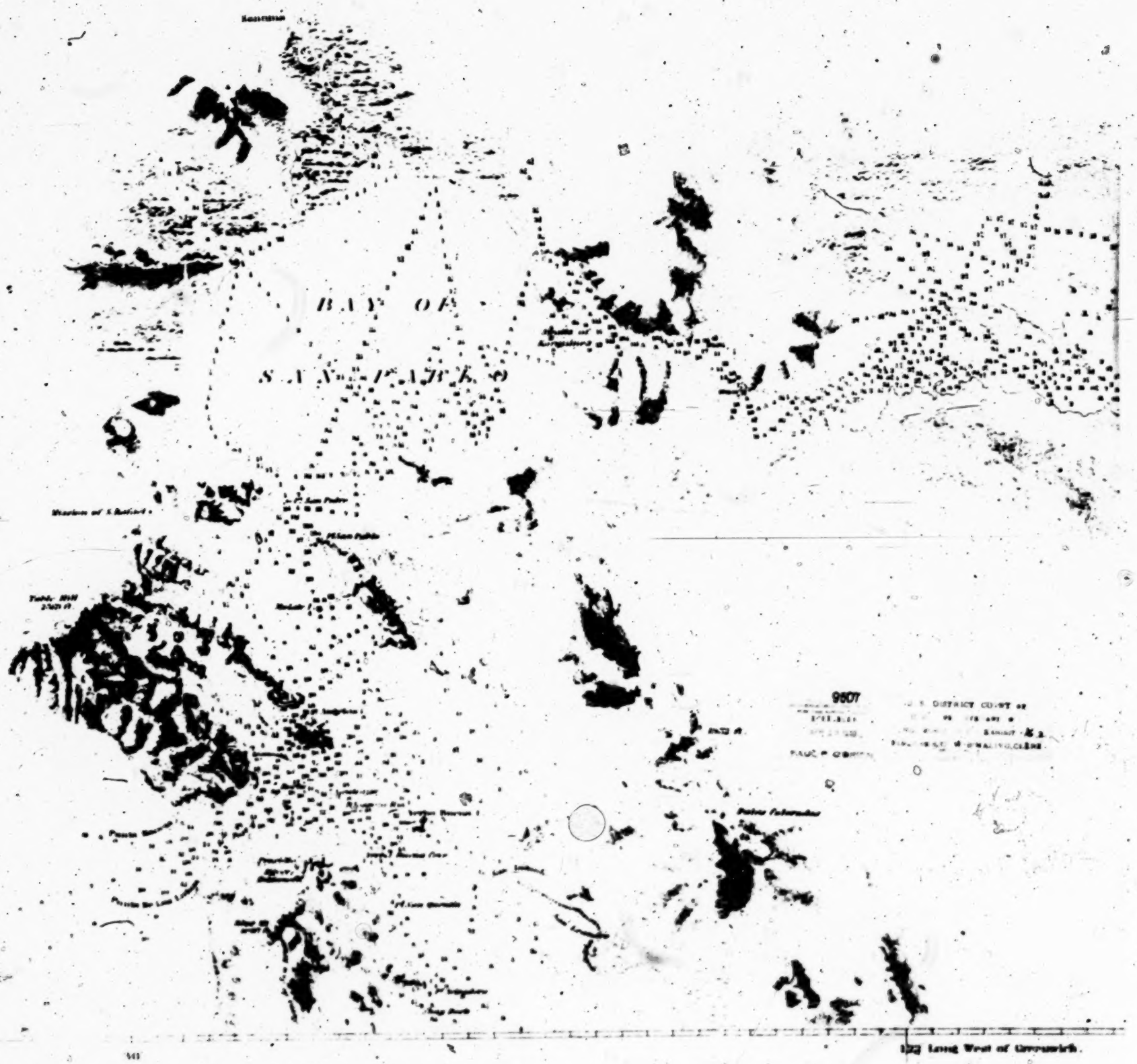
MARE ISLAND, CALIFORNIA

EXPLANATION

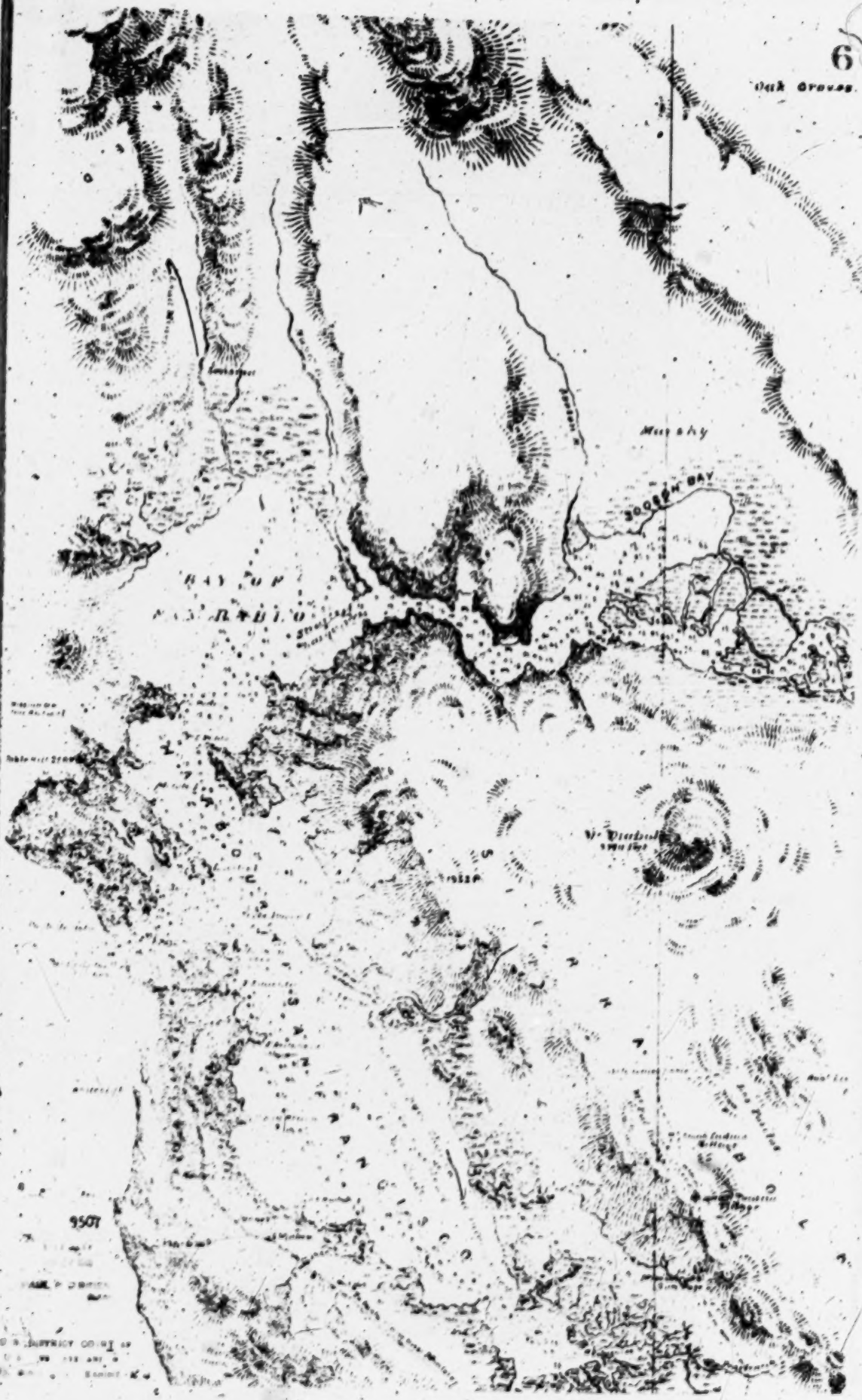
1200-3-33

Plaintiff's Exhibit K-1
Captain Beechey
1827-8

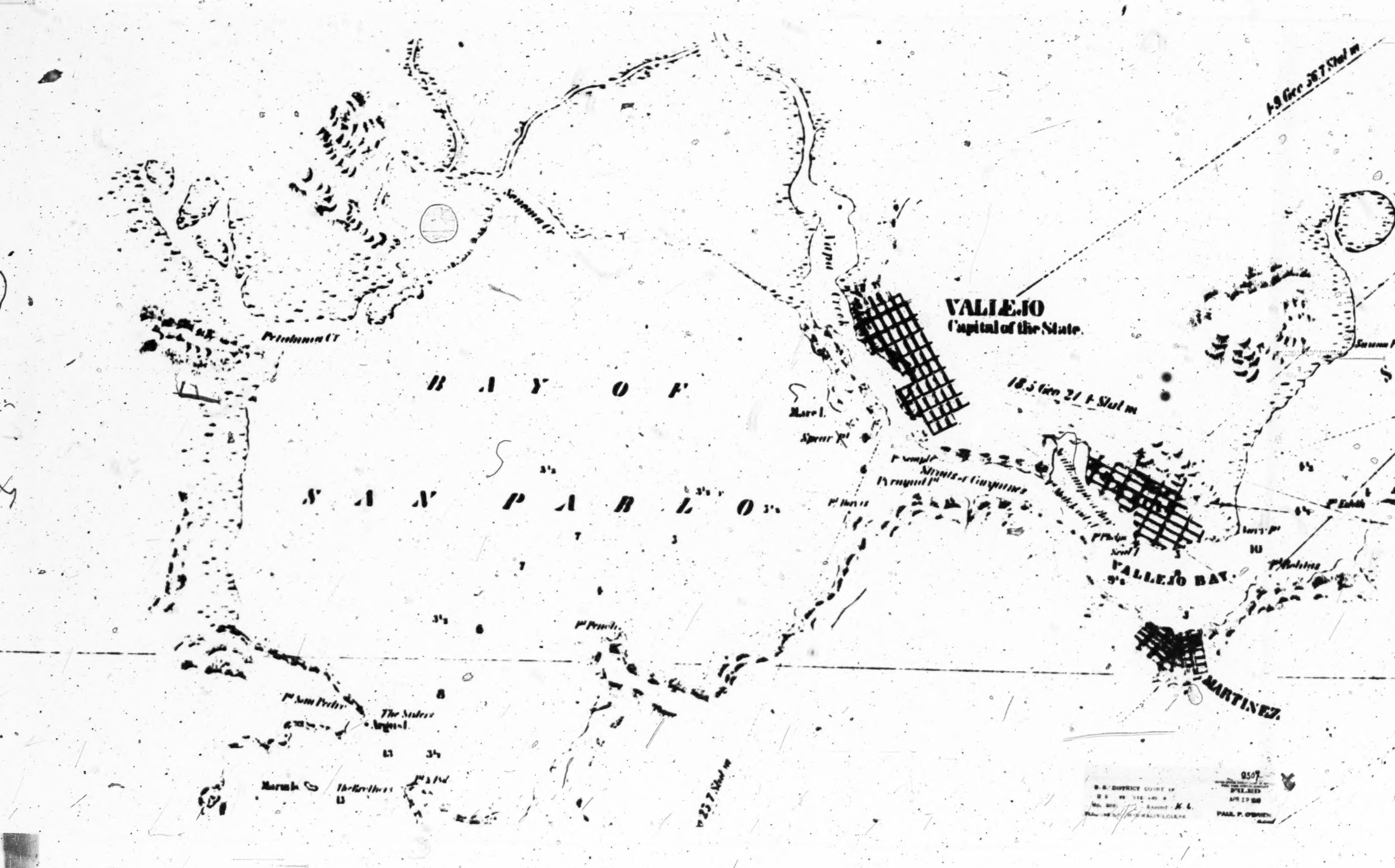



BAY OF
SAN FRANCISCO
9607
122 Long. West of Greenwich.

BAIE
DE SAN PABLO
BAIE DE LOS CARQUINES
PORT
DE SAN FRANCISCO
DANS LA HAUTE CALIFORNIE.
9807
Mt de la Table
S. Antonio

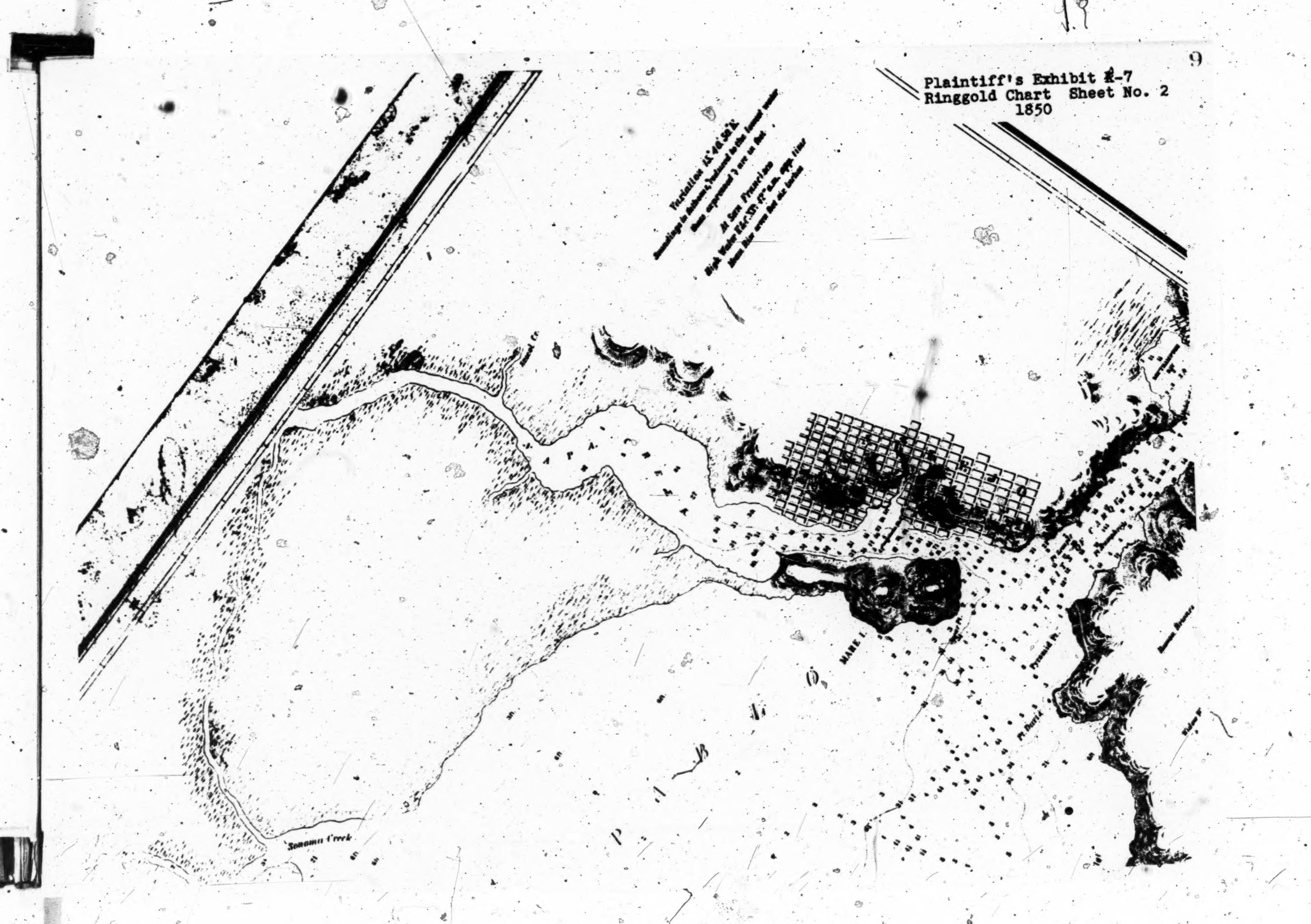

Oak Groves
JOSEPH BAY
9501

YOLO
Knight
Gardners
Pulo Cr.
Woltskills
Bakers
SONOMA
NAPA
Napa City
SOLANO
Berrys
Vallejo
Martinez
New York
Mt. Diabolo
CONTRA COSTA
Livermore
S. Jose Mis
SAN JOSE
Alviso
St. Clara
Quicksilver
Golden Gate
S. Rafael
Sonoma
St. Louis
Suscol Cr.
Napa R.
Corners Cr.
Pudhuma Cr.
San Antonio Cr.
Passian R.



VALLEJO
Capital of the State.
B A Y O F
S A N P A B L O
VALLEJO BAY
MARTINEZ
Petaluma Cr
Mare I.
Spear Pt
The Sisters
Marin Is
The Brothers
Pt San Pedro
Pt Pinole
Pt Bolinas
Pt Edith
Pt Sample
Straits of Carquinez
Pt Pinole
Vapo Creek
18.5 Geo 21 F Stat m
4.9 Geo 36.7 Stat m
23.7 Stat m
U. S. DISTRICT COURT
PAUL P. O'BRIEN

Plaintiff's Exhibit #-7
Ringgold Chart Sheet No. 2
1850



Record.

Plaintiff's Exhibit L-1
U. S. Coast Survey (Williams and Blunt)
1849

U.S. COAST SURVEY

A.D. BACHE, Superintendt

RECONNAISANCE

of

MARE ISLAND STRAIT

TRIANGULATION

By T.S. WILLIAMS, Asst U.S.C.S.

And S. BLUNT, Lieut U.S.N.

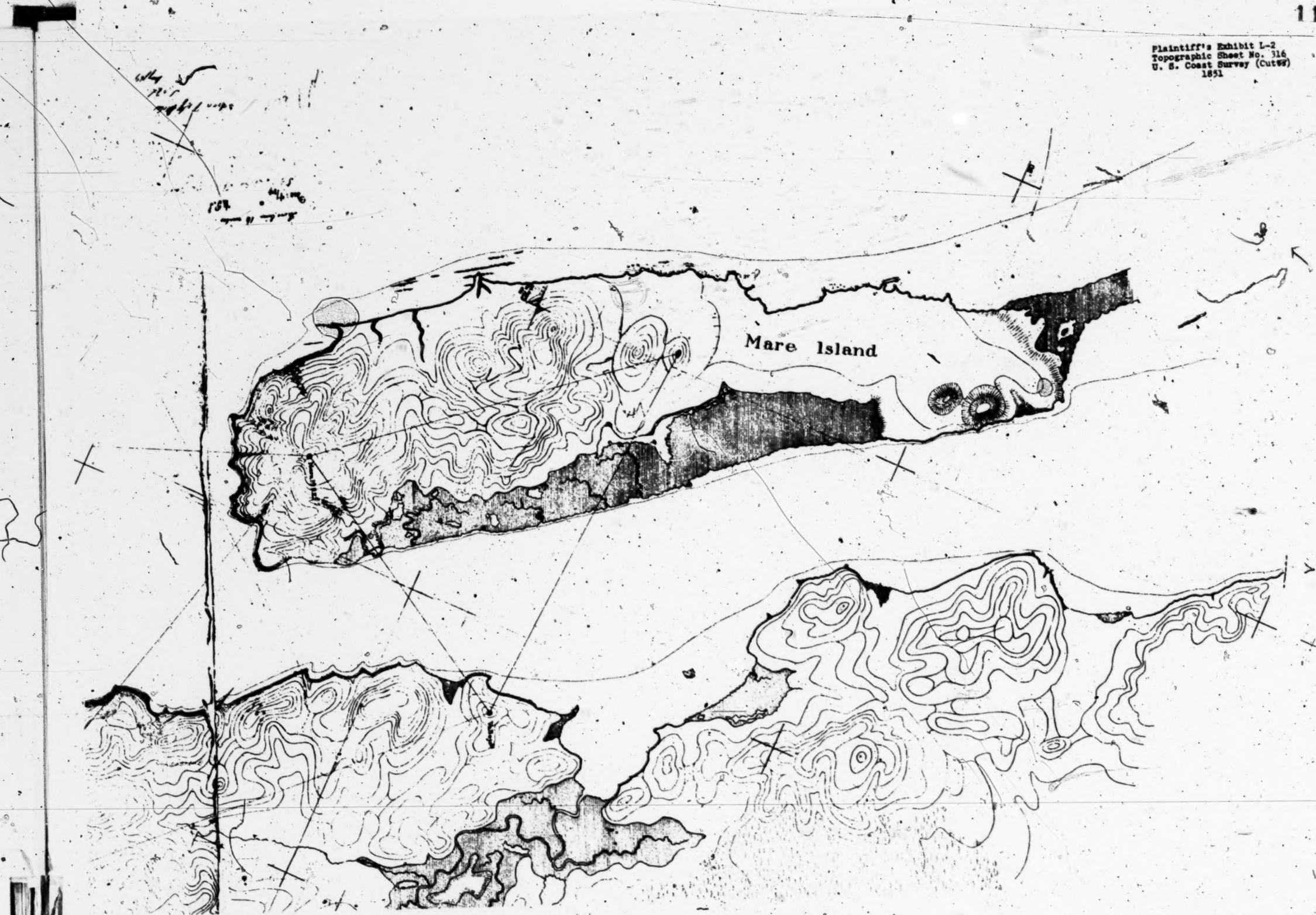
HYDROGRAPHY

By the Party under the Command

of Wm. P. McARTHUR, A. Asst U.S.C.S. Lieut U.S.N.

Register No. 236

Plaintiff's Exhibit L-2
Topographic Sheet No. 316
U. S. Coast Survey (Cut 68)
1851



Plaintiff's Exhibit L-5

U.S. COAST SURVEY
A.D. BACHE Superintendent

MARE ISLAND STRAITS
CALIFORNIA

Triangulation by J.S Williams and R.D.Cutts Assts. U.S.C.S. and
Lt. S.F.Blunt U.S.N. Joint Comm.rs Army & Navy Officers
Topography by R.D.Cutts Asst. U.S.C.S.
Hydrography by the Party
under the command of W.P.Mc Arthur
Lieut.U.S.N. and Asst. U.S.C.S.
Scale 36000
1851

Site of Vallejo
Seat of Government of California

Part of Benicia

Goose Pt.

Commission Rock

Mare Island

Strait of Karquines

Strait

MARE

BAY OF SAN PABLO

Notes

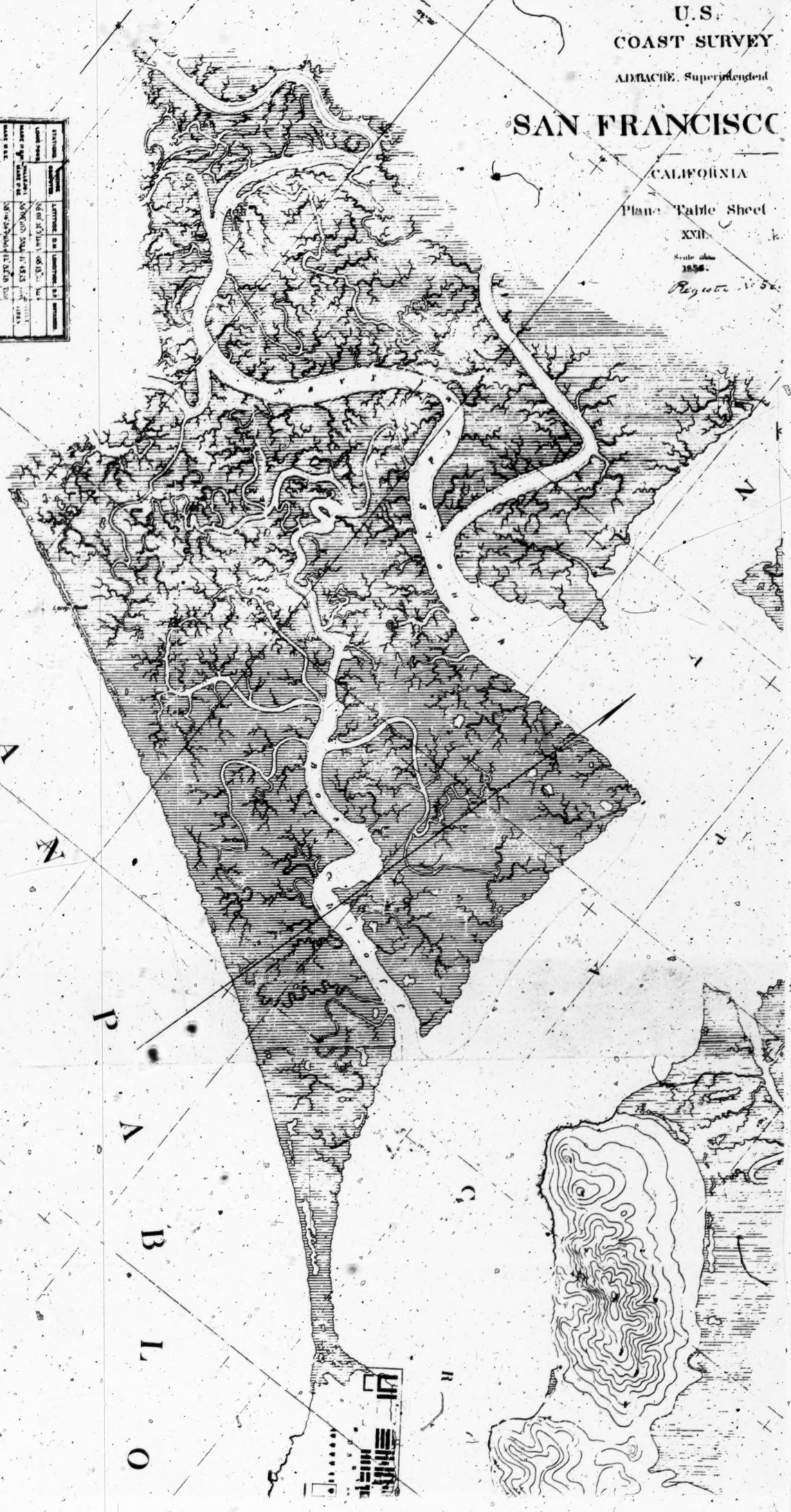
The Soundings were taken during November in the rainy season and represent the general depth of the water during that period, a reduction of 6 feet must be made for indicating the depths during the dry season (in summer)

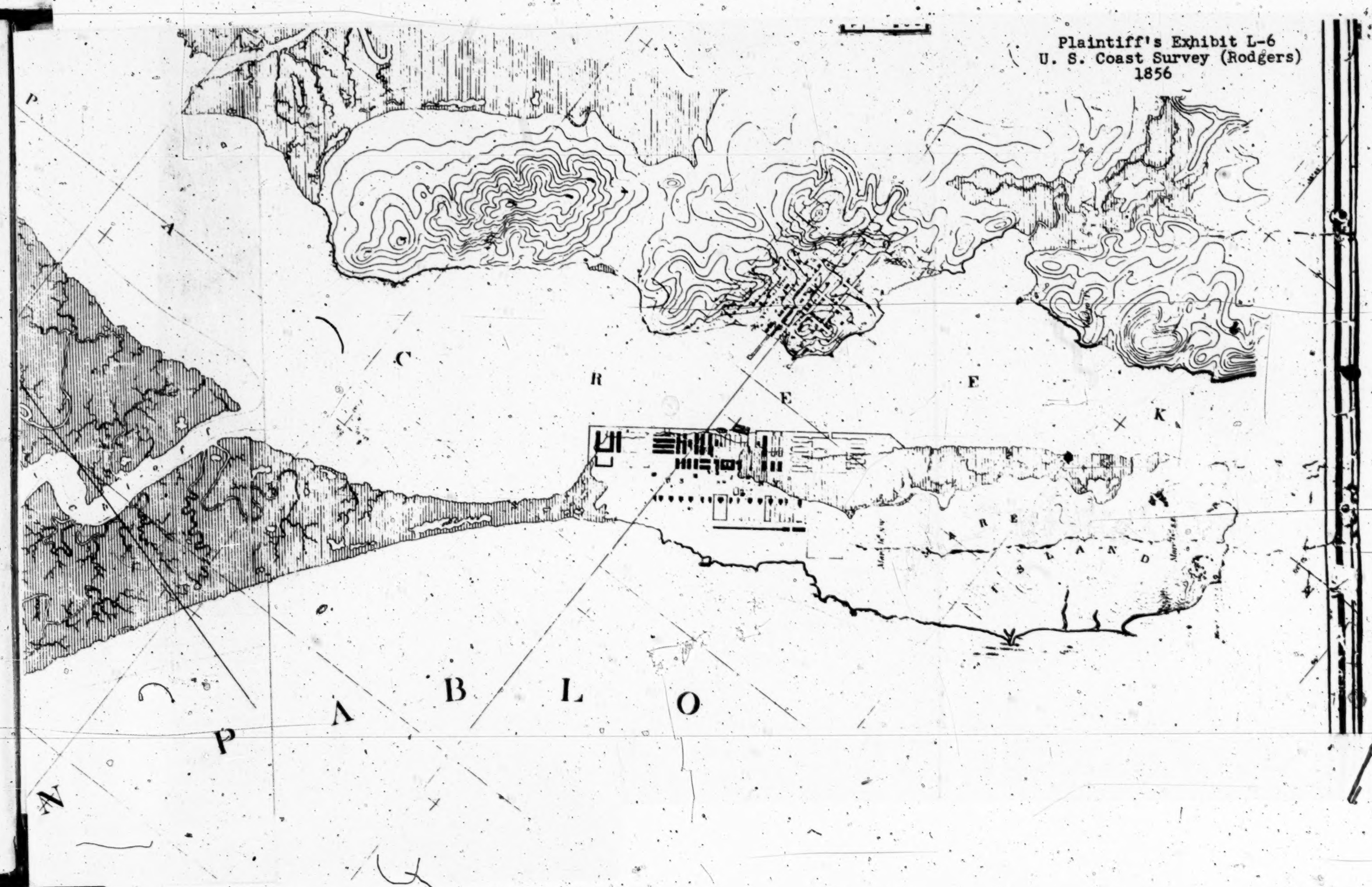
The Soundings are expressed in feet. Only the characteristic Soundings are here given, these being so selected as best to show the form of the bottom. The curves of depth are indicated thus for 6 feet, thus for 12 feet, thus for 18 feet.

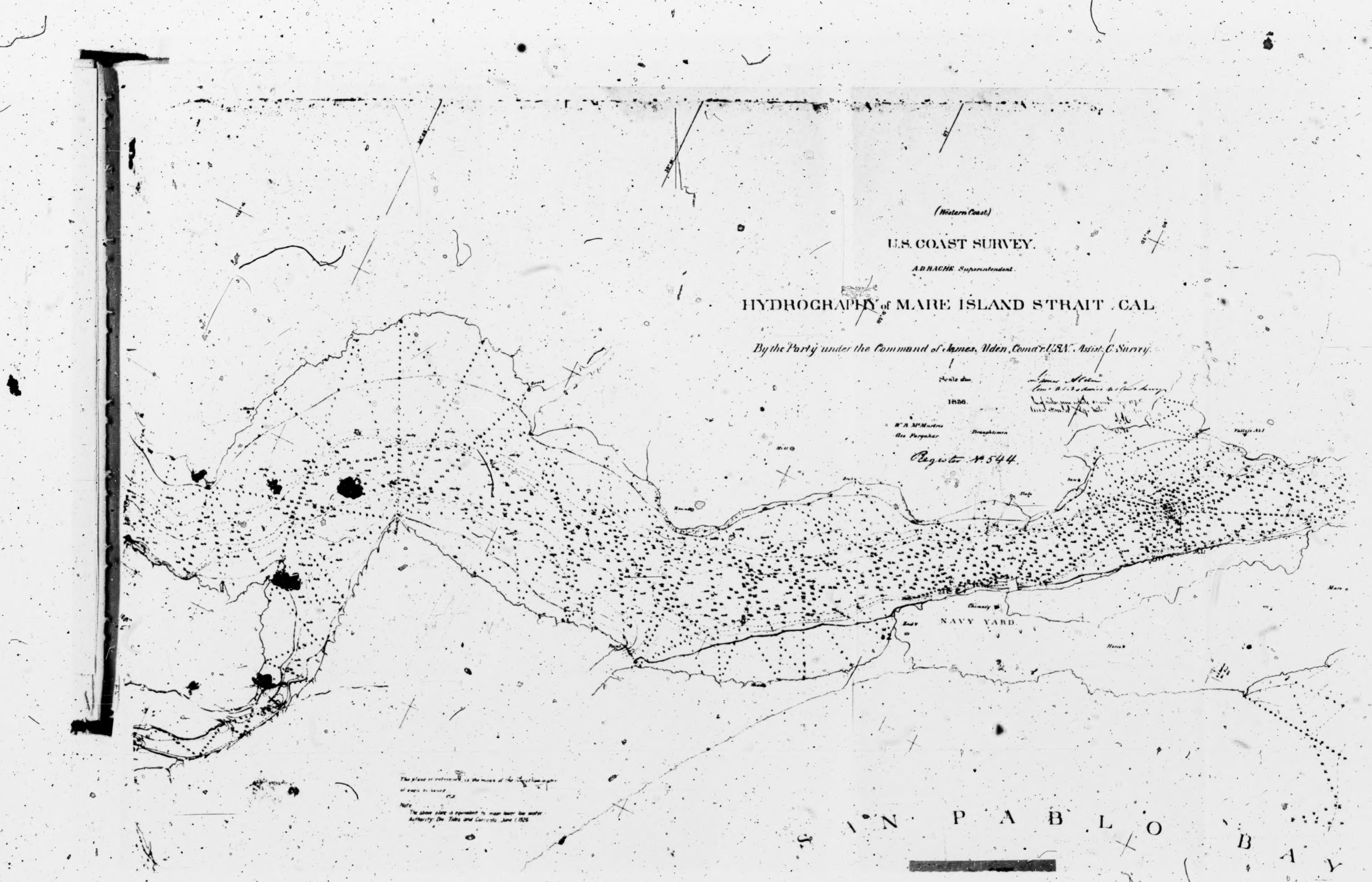
Commission Rock is above water at low tides in summer

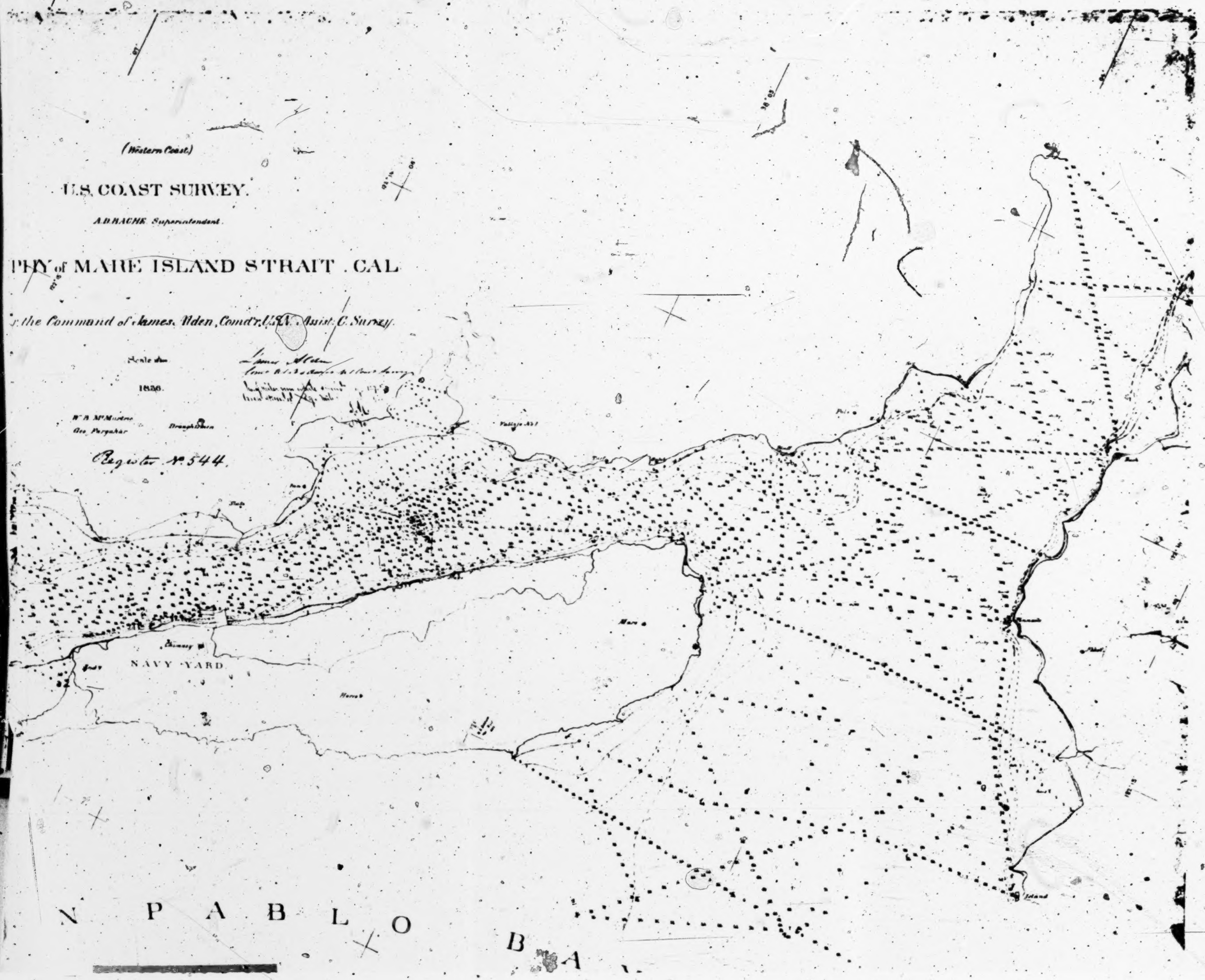
Abbreviations used in the bottoms of this Sketch
brnt. for hard
stk. for sticky
blu. for blue

Statute Miles


U.S.
COAST SURVEY
A.D.BACHE, Superintendent
SAN FRANCISCO
CALIFORNIA
Plane Table Sheet
XVII.
Scale
1856.
Register No 5
SAN PABLO


Plaintiff's Exhibit L-6
U. S. Coast Survey (Rodgers)
1856
P
A
C
R
E
E
K
N
P
A
B
L
O
M
A
R
E
I
S
L
A
N
D


(Western Coast)
U.S. COAST SURVEY.
A.D. BACHE Superintendent.
HYDROGRAPHY of MARE ISLAND STRAIT . CAL
By the Party under the Command of James Alden, Comdr. U.S.N. Assist. C. Survey.
Scale 1 in.
1856.
W. B. McMurtrie
Geo. Farquhar
Draughtsmen
Register No. 544.
NAVY YARD
Chimney
Mare
Note
The above plane is equivalent to mean lower low water
Authority: Div. Tides and Currents June 1, 1826
SAN PABLO BAY


(Western Coast)
U.S. COAST SURVEY.
A.D.BACHE Superintendent.
PHY of MARE ISLAND STRAIT . CAL
r the Command of James Alden, Comd'r, U.S.N. Assist. C. Survey.
Scale
1856.
Register No. 544.
NAVY YARD
N PABLO BA

HYDROGRAPHY of MARE ISLAND STRAIT, CAL

By the Party under the Command of James Alden, Comd'r U.S.N. Assist. C. Survey.

1856.

Register № 544.

NAVY YARD

SAN PABLO BAY

The plane of reference is the mean of the lowest low waters of each day

Note

The above plane is equivalent to mean lower low water
Authority: Dir. Tides and Currents, June 1926

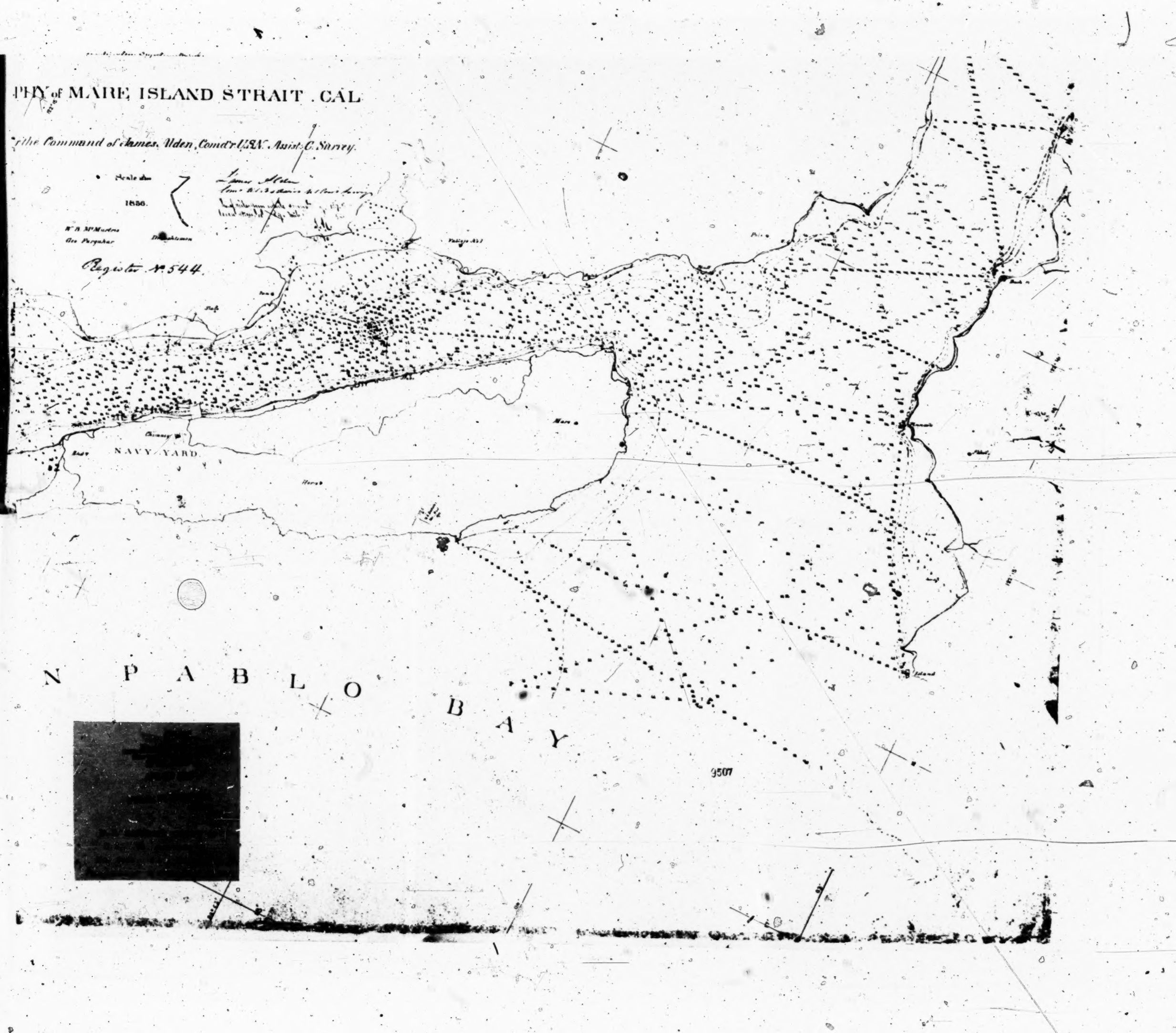
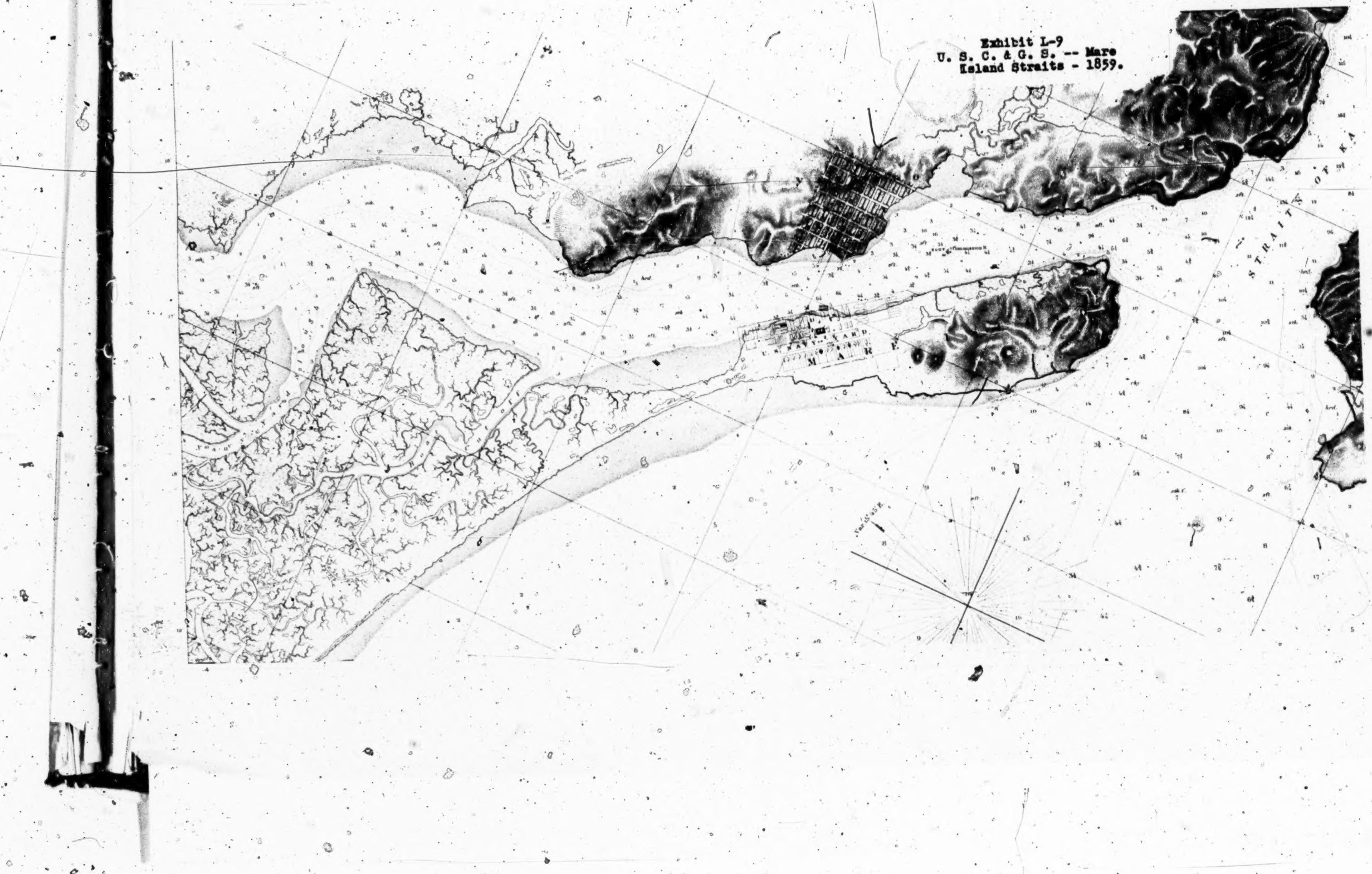
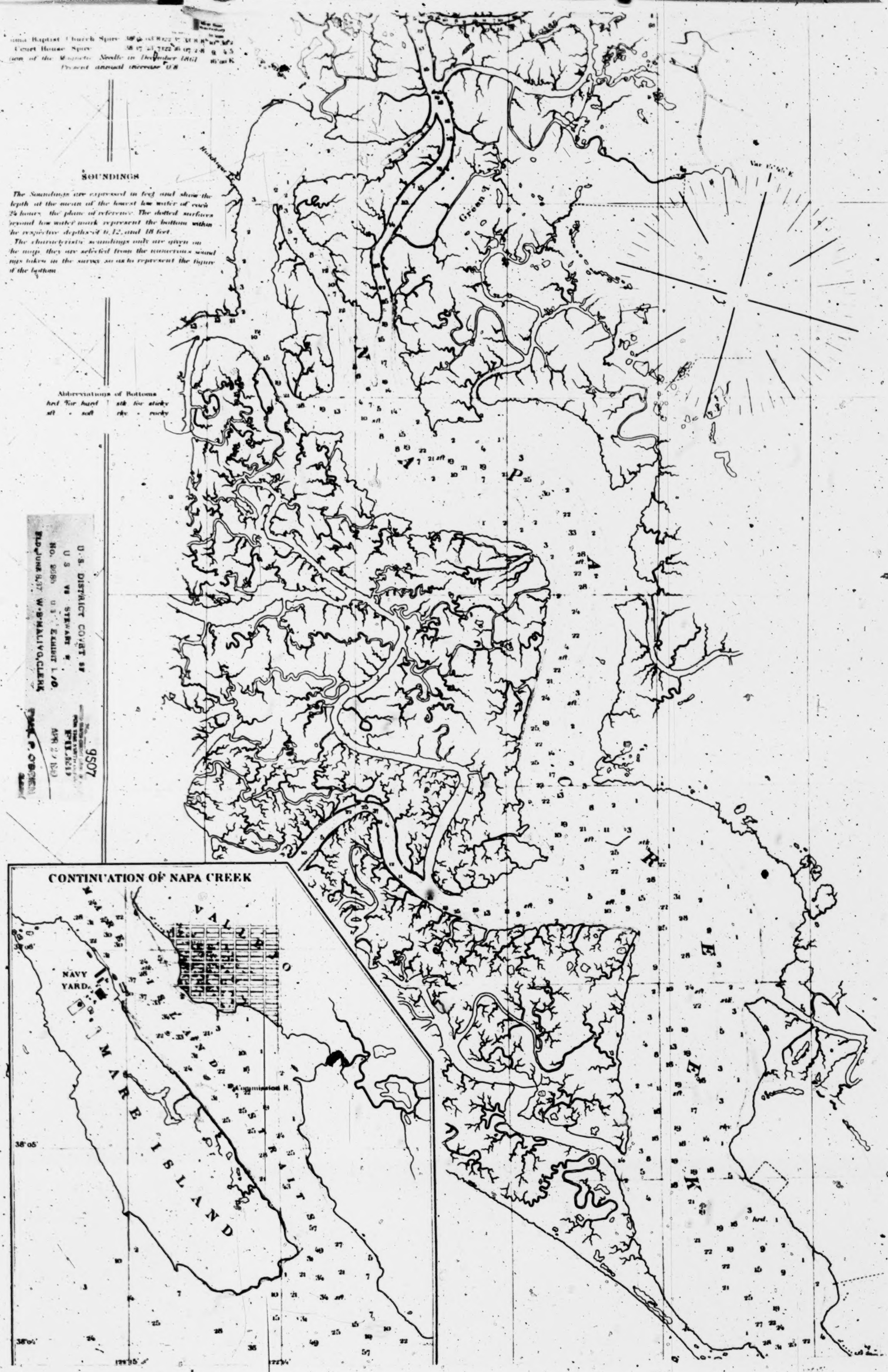

PHY of MARE ISLAND STRAIT . CAL
r the Command of James Alden, Comd'r U.S.N. Assist. C. Survey.
Scale
1856.
Register No. 544.
NAVY YARD
N PABLO BAY
9507

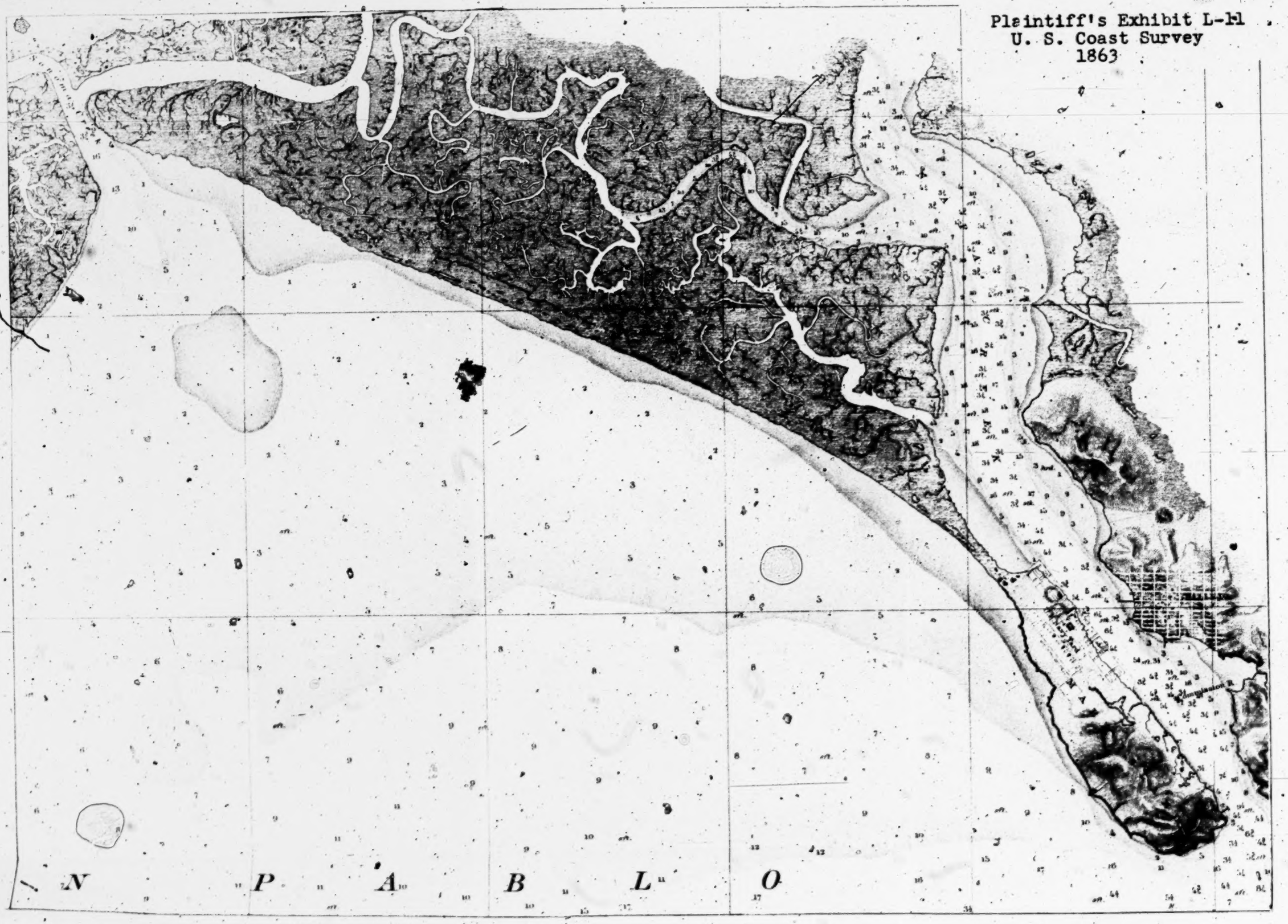
Exhibit L-9
U. S. C. & G. S. -- Mare
Island Straits - 1859.





Baptist Church Spire
Court House Spire
Present annual increase 0.8
SOUNDINGS
The Soundings are expressed in feet and show the depth at the mean of the lowest low water of each 24 hours, the plane of reference. The dotted surfaces beyond low water mark represent the bottom within the respective depths of 6, 12, and 18 feet.
The characteristic soundings only are given on the map, they are selected from the numerous soundings taken in the survey so as to represent the figure of the bottom.
Abbreviations of Bottoms
hrd for hard
stk for sticky
sft " soft
rky " rocky
U.S. DISTRICT COURT
U S VS STEWART
EXHIBIT
FILED JUNE 8, 37 W. B. MALING, CLERK
9507
CONTINUATION OF NAPA CREEK
NAVY YARD
MARE ISLAND
Commission R.
38°05'
38°04'

Plaintiff's Exhibit L-11
U. S. Coast Survey
1863



Plaintiff's Fxhibit L-15
U. S. Coast and Geodetic Survey
1915

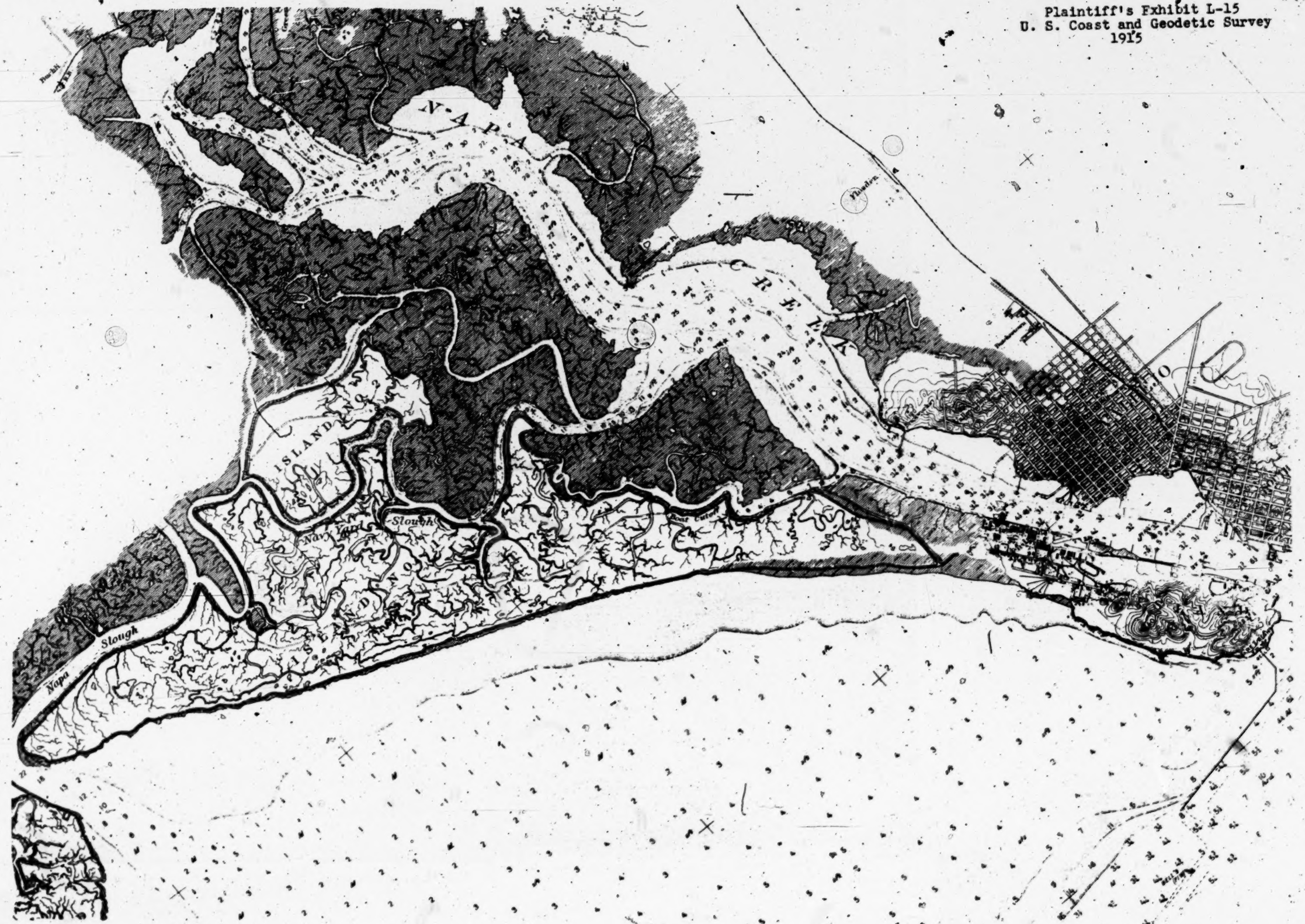
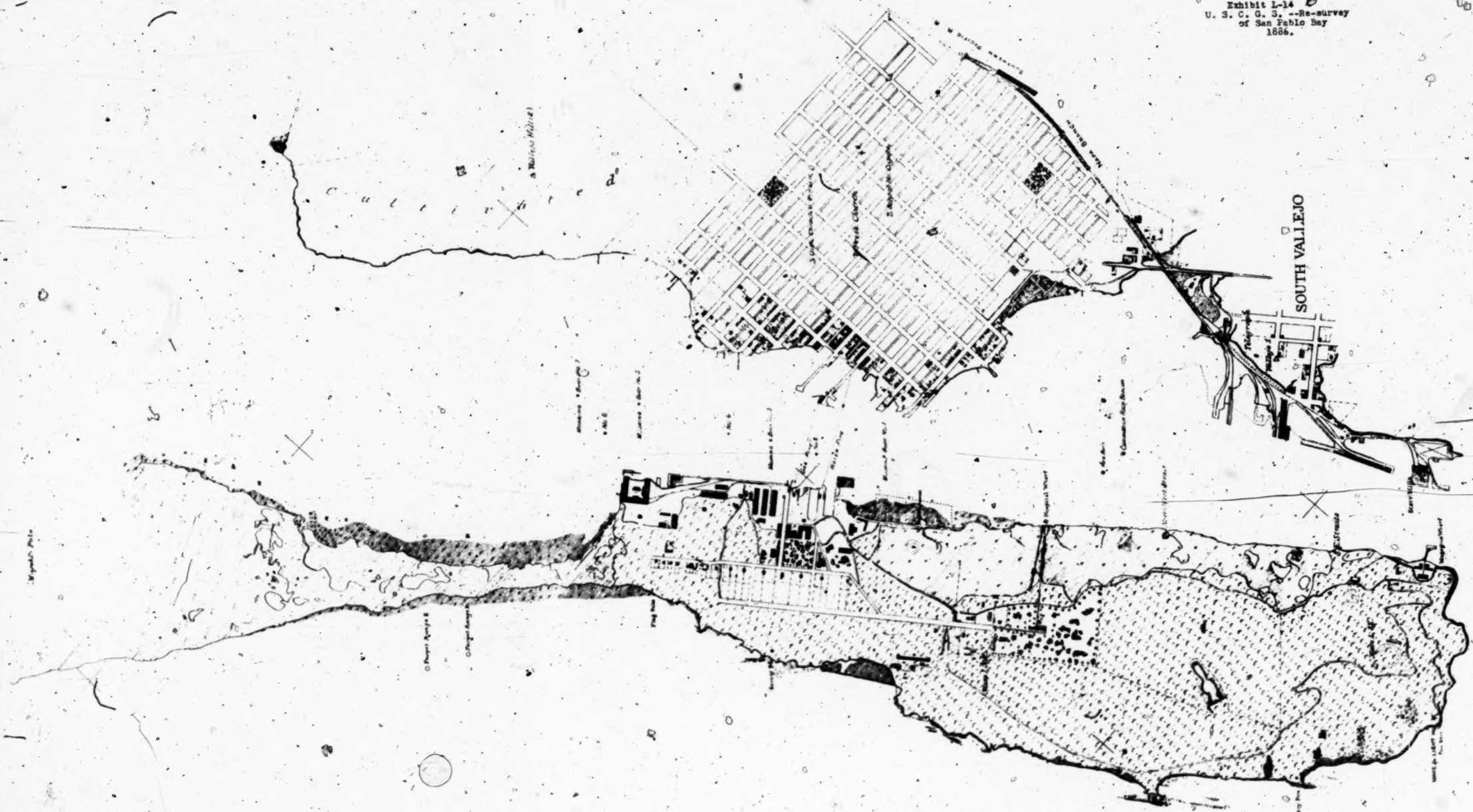
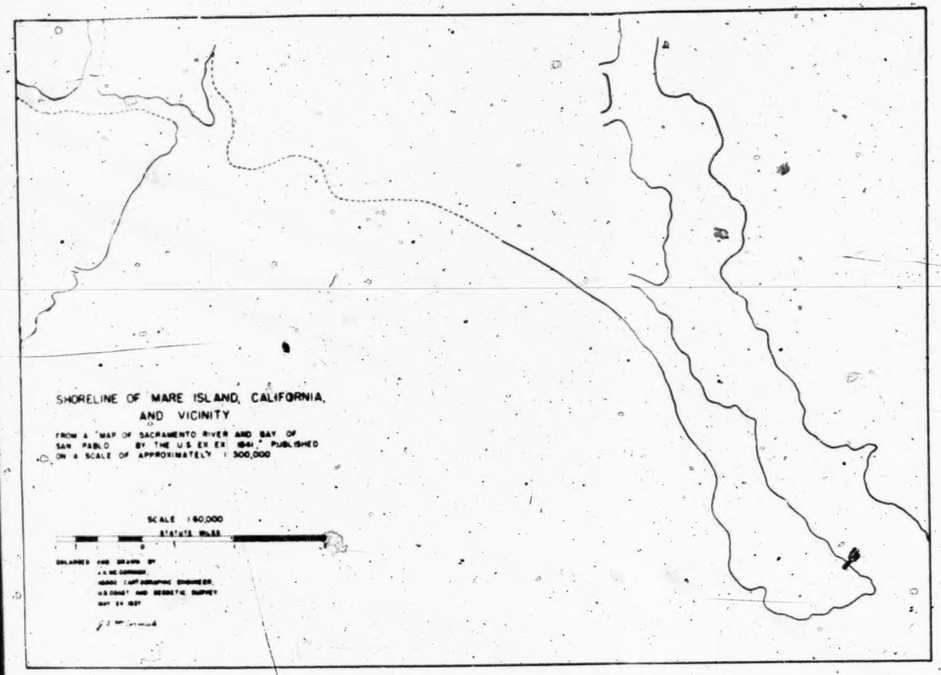
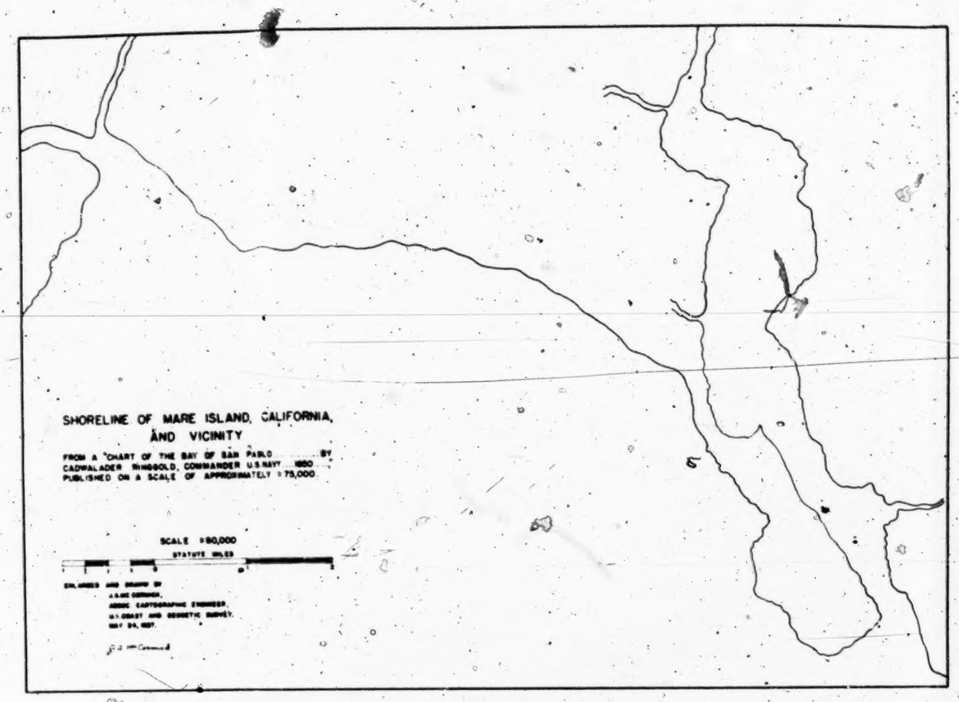
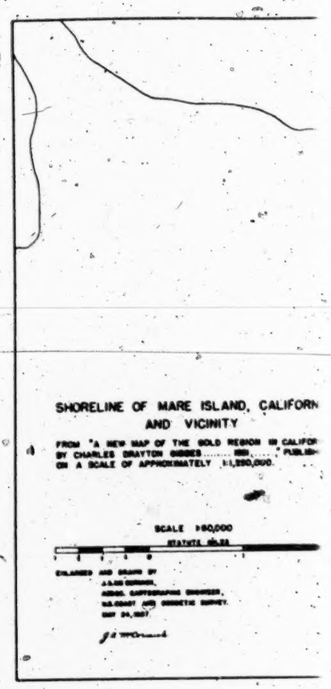


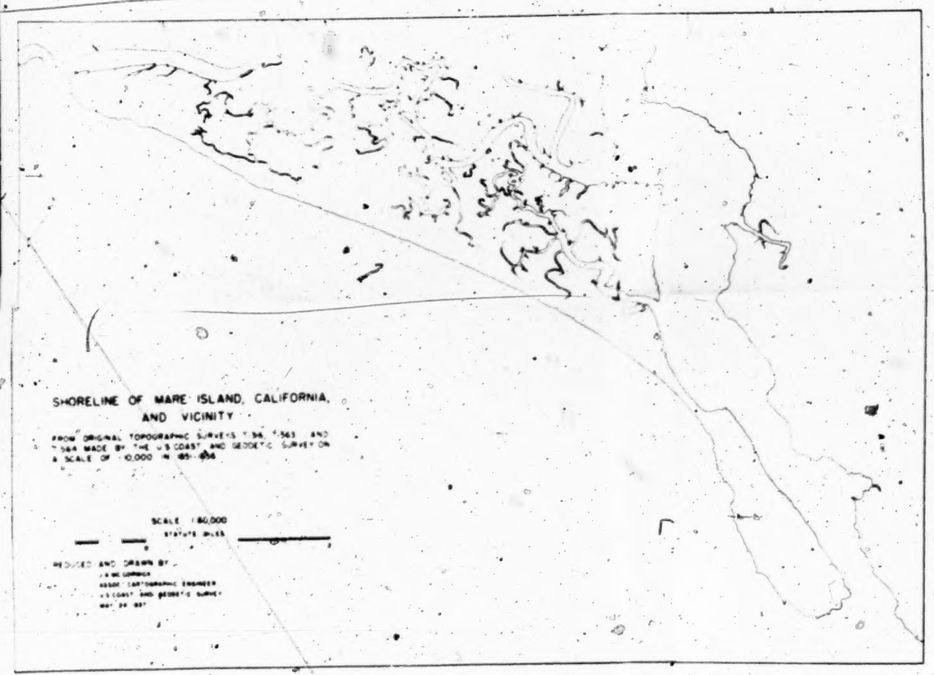
Exhibit L-14
U. S. C. G. S. --Re-survey
of San Pablo Bay
1886.

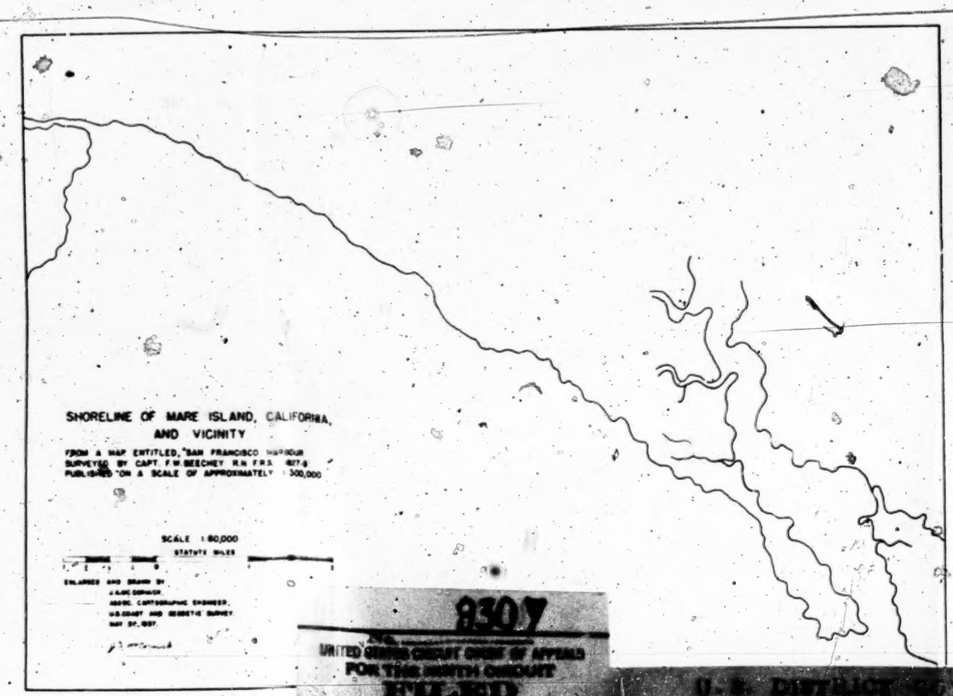


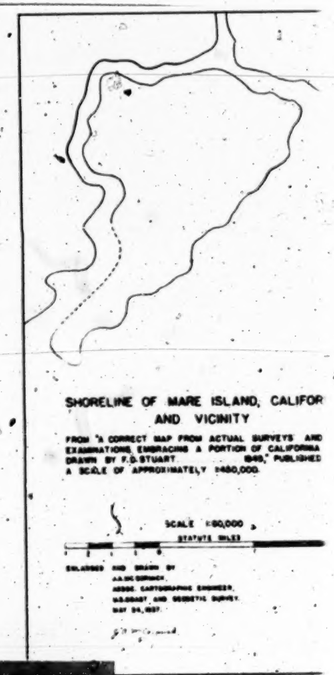




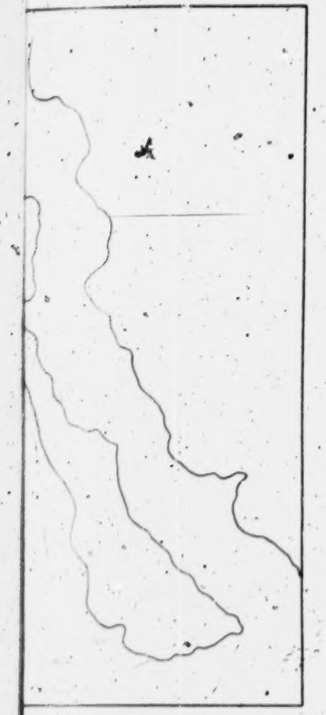


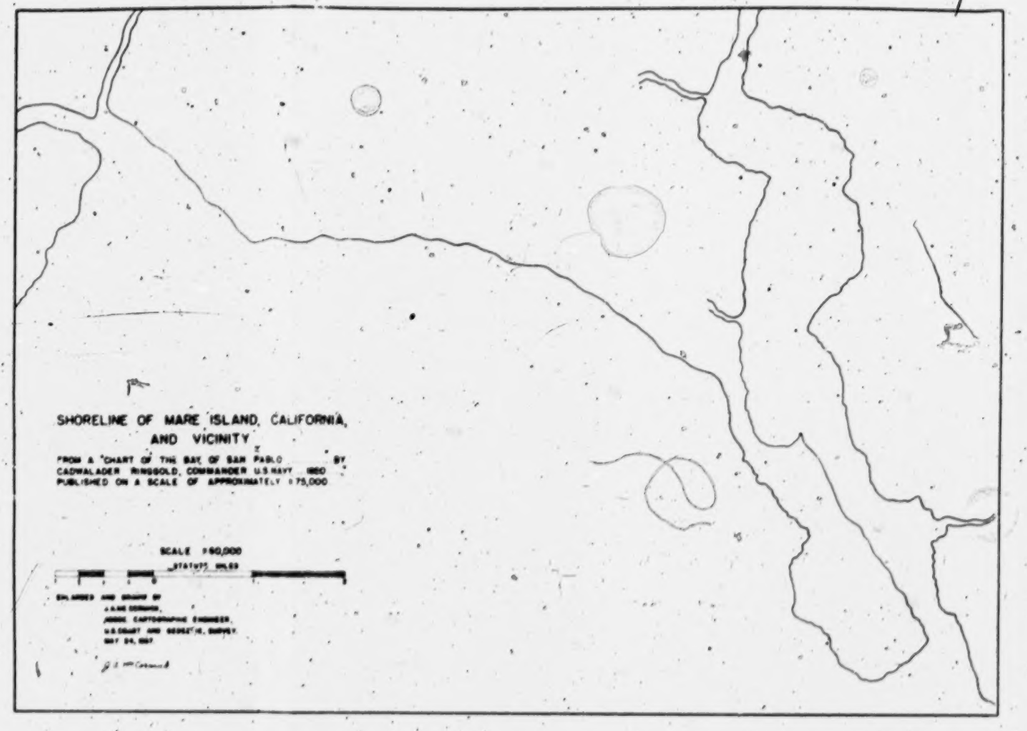


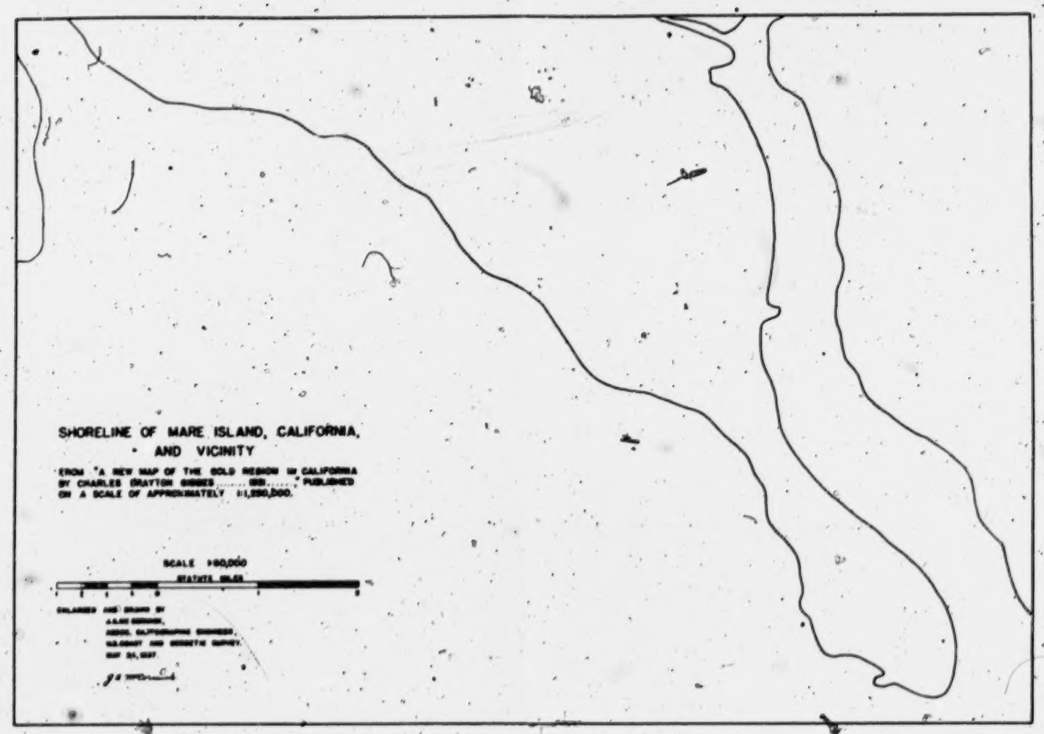


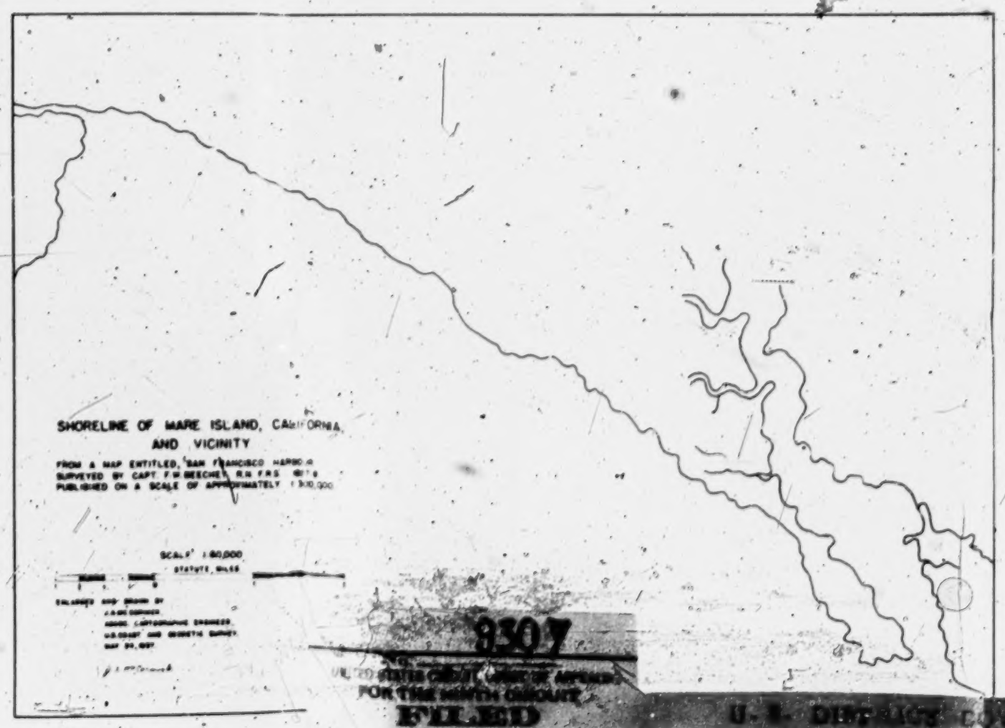


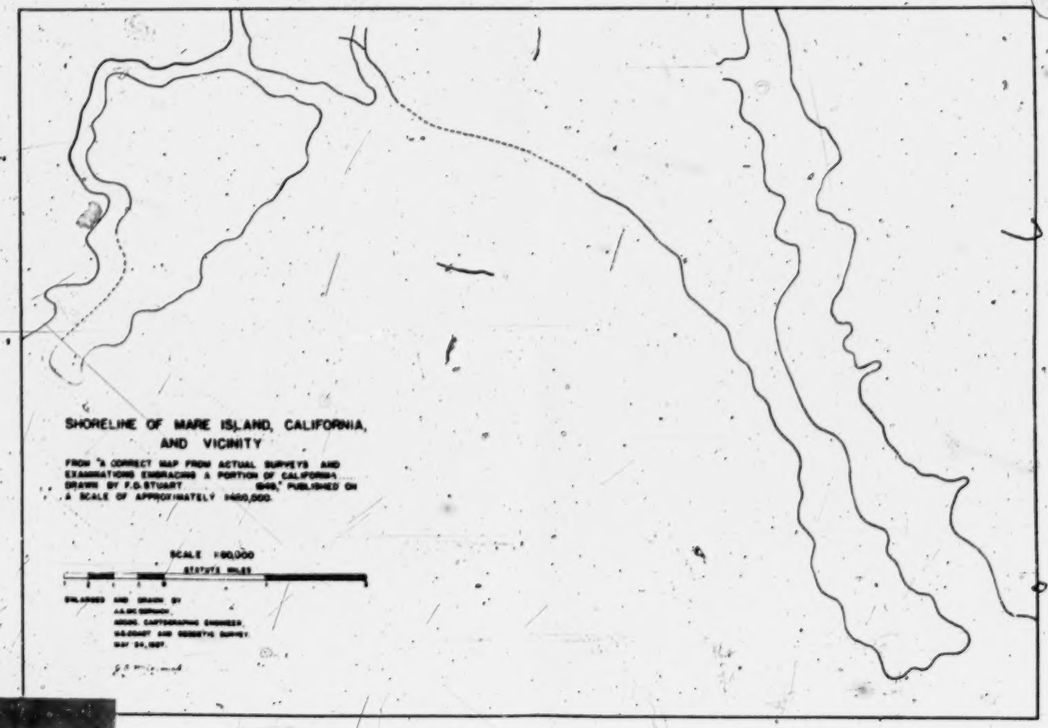
9307
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
U. S. DISTRICT COURT



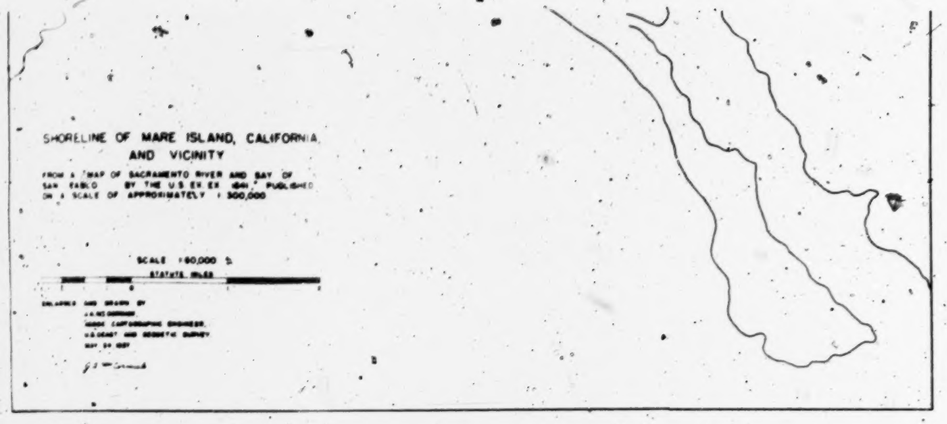


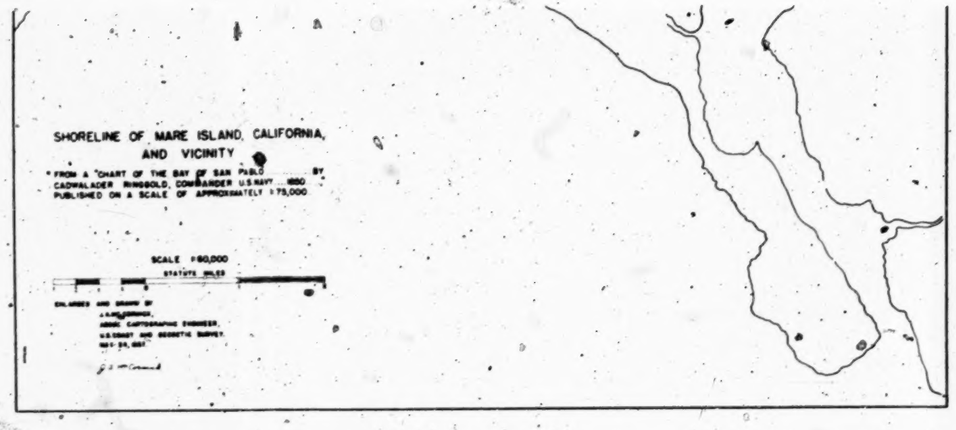


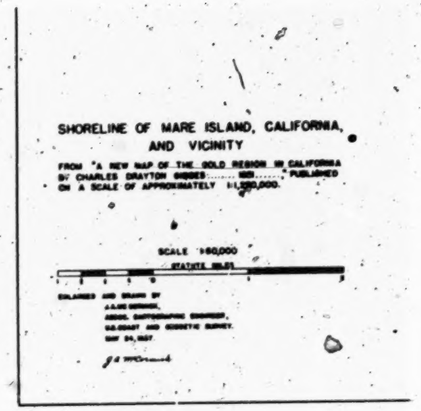


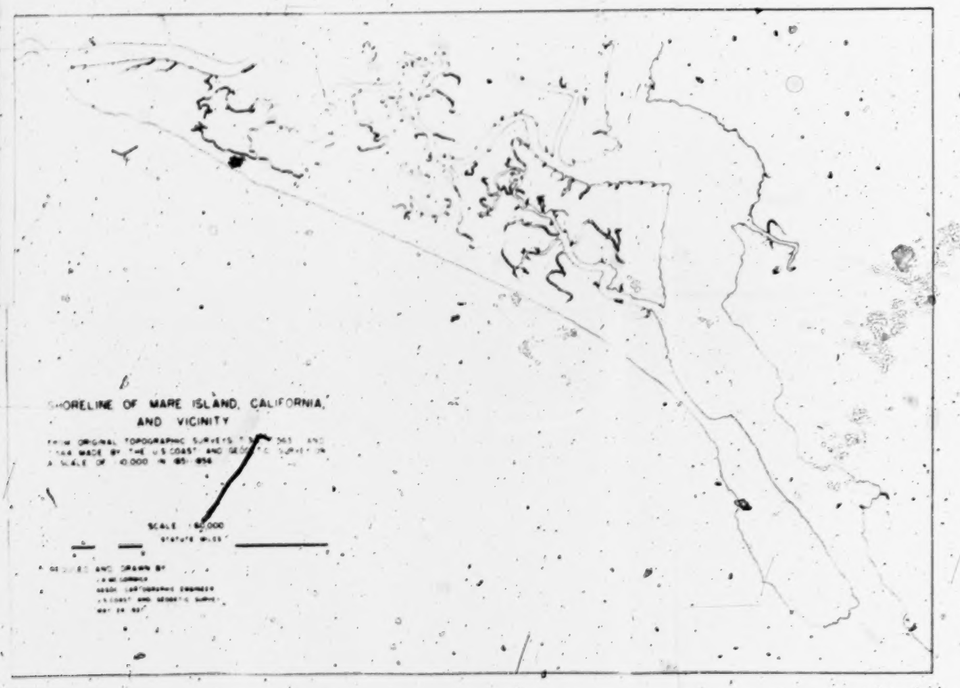


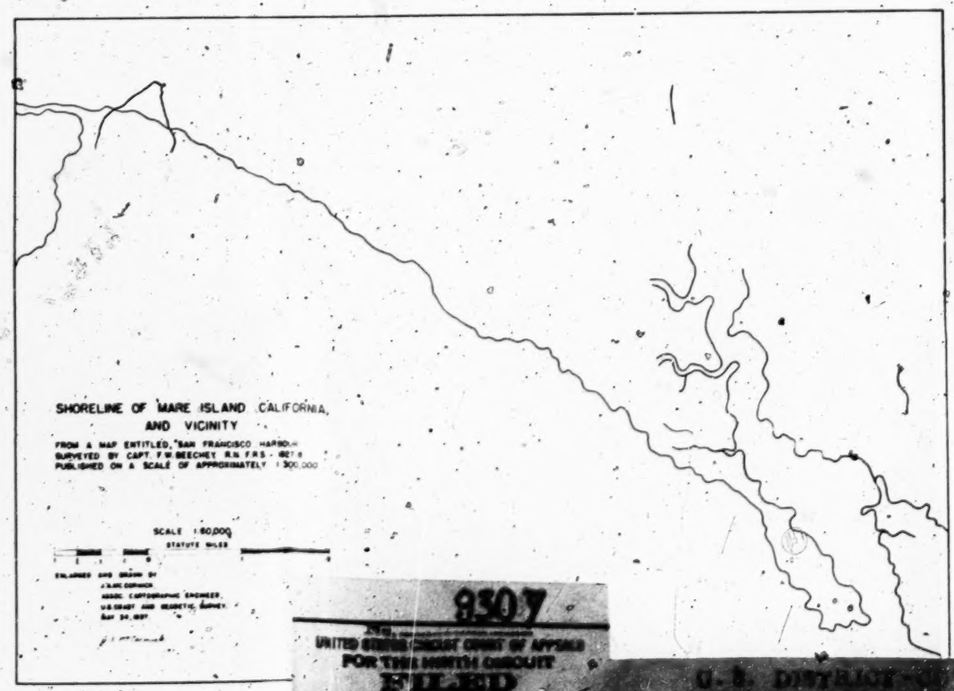
9307
FILED
U.S. DISTRICT COURT

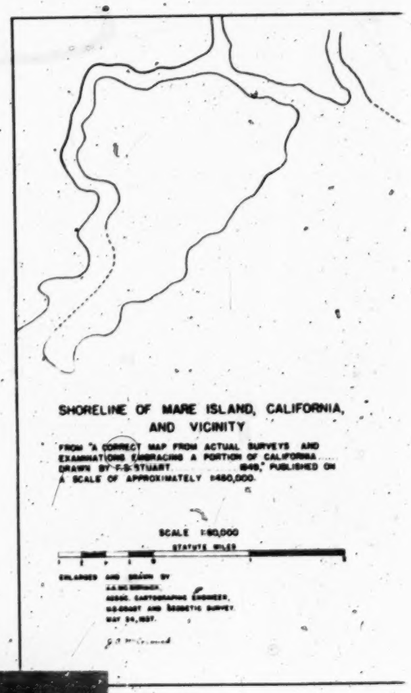












9307
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 29 196
PAUL P. O'BRIEN
U. S. DISTRICT COURT

SHORELINE OF MARE ISLAND, CALIFORNIA,
AND VICINITY

FROM A "CHART OF THE BAY OF SAN PABLO ... 1850 ... BY CADWALADER RINGGOLD, COMMANDER U.S.NAVY ... 1850 ... PUBLISHED ON A SCALE OF APPROXIMATELY 1:75,000

SCALE 1:80,000
STATUTE MILES

ENLARGED AND DRAWN BY
J.A.DIX CERVINO,
ASSOC. CARTOGRAPHIC ENGINEER,
U.S.COAST AND GEODETIC SURVEY
MAY 24, 1937.

SHORELINE OF MARE ISLAND, CALIFORNIA,
AND VICINITY.

FROM "A NEW MAP OF THE GOLD REGION IN CALIFORNIA BY CHARLES DRAYTON GIBBES ..... 1850 ....." PUBLISHED ON A SCALE OF APPROXIMATELY 1:1,250,000.

SCALE 1:80,000
STATUTE MILES

ENLARGED AND DRAWN BY
J.A.DIX CERVINO,
ASSOC. CARTOGRAPHIC ENGINEER,
U.S.COAST AND GEODETIC SURVEY
MAY 24, 1937.

SHORELINE OF MARE ISLAND, CALIFORNIA,
AND VICINITY.

FROM A MAP ENTITLED, "SAN FRANCISCO HARBOR ... SURVEYED BY CAPT F.W.BEECHEY R.N. F.R.S. 1827 ... PUBLISHED ON A SCALE OF APPROXIMATELY 1:30,000

SCALE 1:80,000
STATUTE MILES

ENLARGED AND DRAWN BY
J.A.DIX CERVINO,
ASSOC. CARTOGRAPHIC ENGINEER,
U.S.COAST AND GEODETIC SURVEY
MAY 24, 1937.

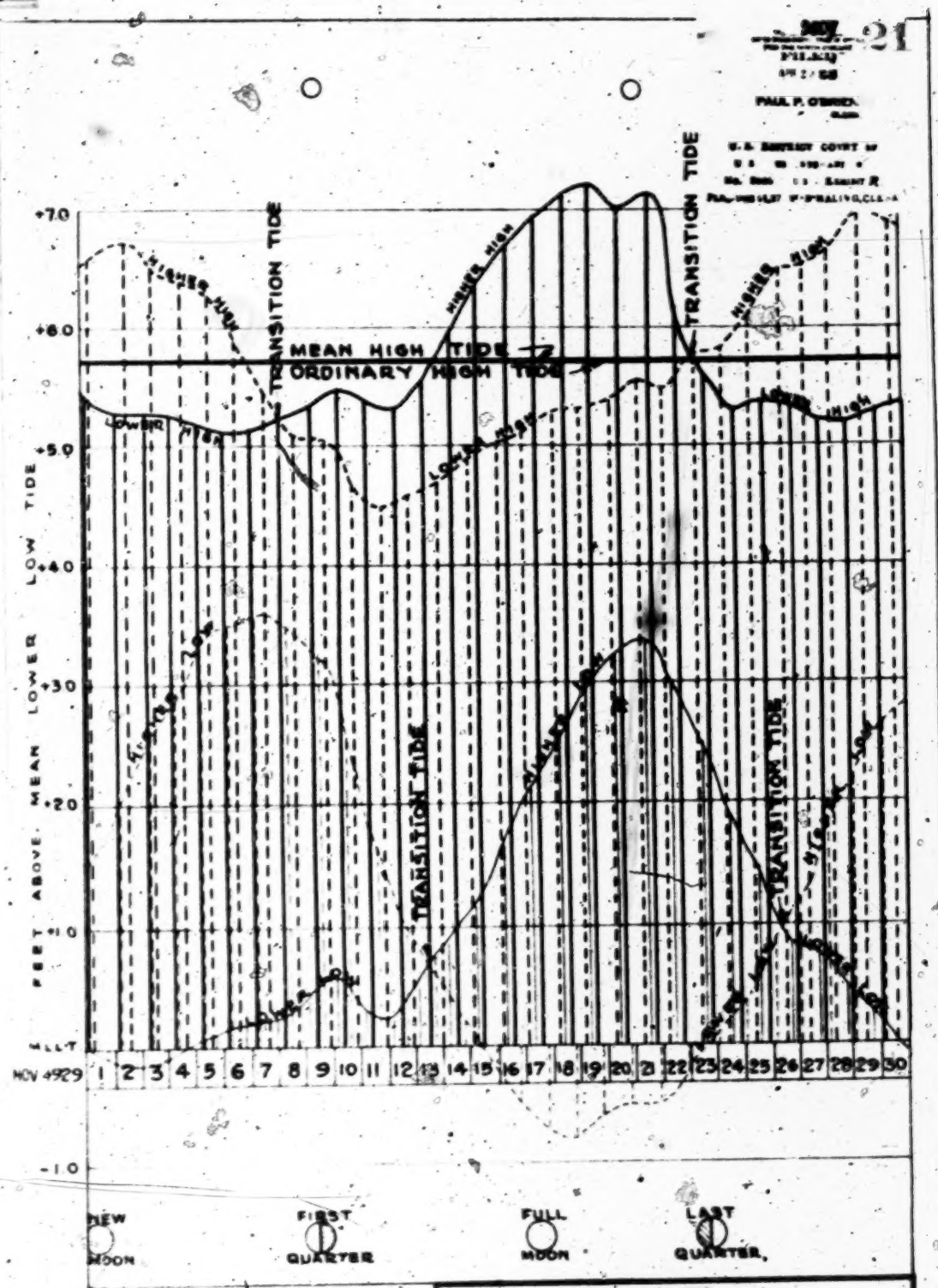
SHORELINE OF MARE ISLAND, CALIFORNIA,
AND VICINITY

FROM "A CORRECT MAP FROM ACTUAL SURVEYS AND EXAMINATIONS EMBRACING A PORTION OF CALIFORNIA DRAWN BY F.D.STUART ... 1849," PUBLISHED ON A SCALE OF APPROXIMATELY 1:480,000.

SCALE 1:80,000
STATUTE MILES

ENLARGED AND DRAWN BY
J.A.DIX CERVINO,
ASSOC. CARTOGRAPHIC ENGINEER,
U.S.COAST AND GEODETIC SURVEY
MAY 24, 1937.

9307
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 29 1938
PAUL P. O'BRIEN
U. S. DISTRICT COURT

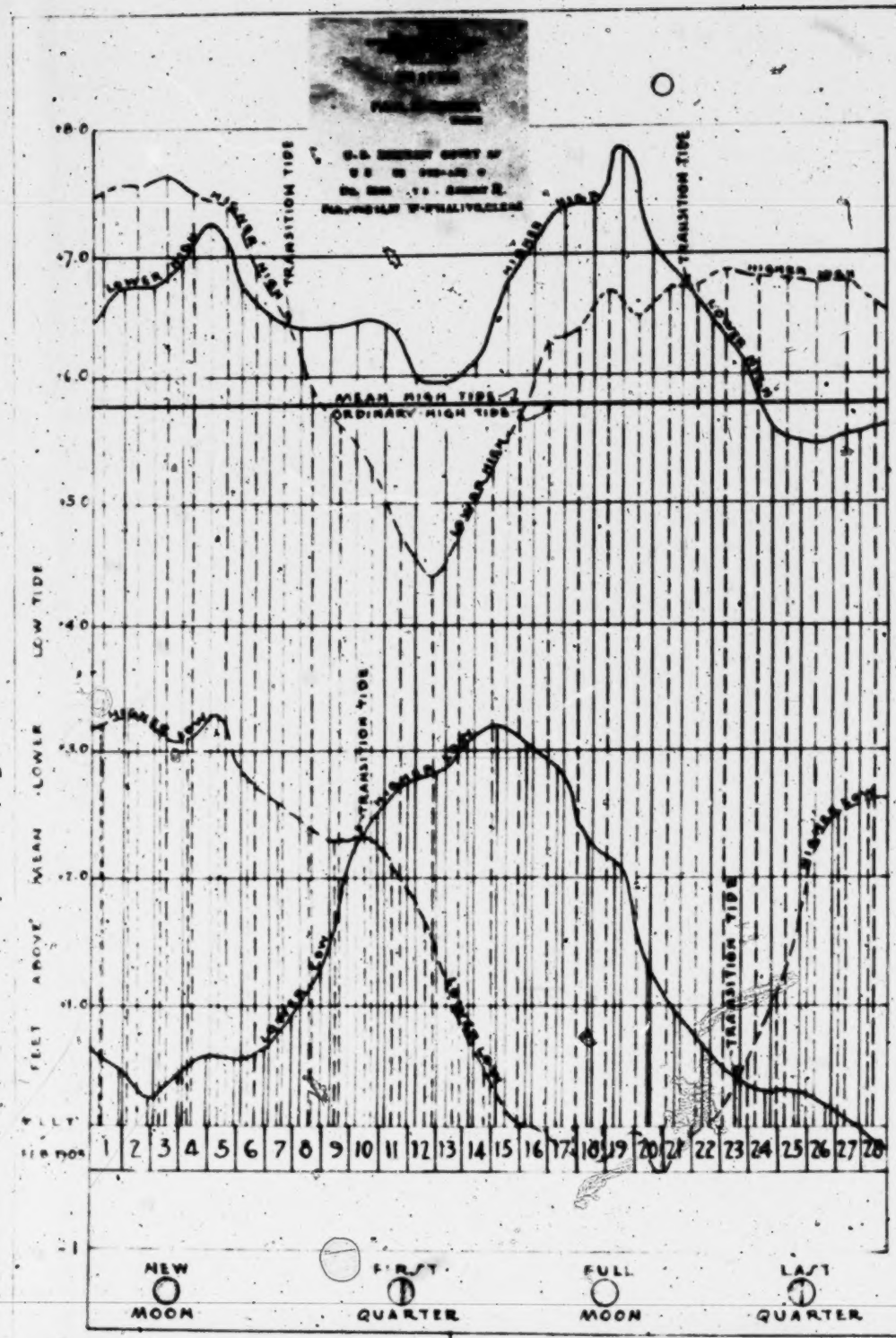


NOTE:-
Month selected because its tides were close to long-time-average elevations

PLATE V
TIDAL REGIMEN
MARE ISLAND STRAIT
For the representative month of
NOVEMBER 1929
(as recorded on the automatic tide gauge)
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENGG BLDG.)

Compiled & Drawn by
John P. Streetman
Associate Civil Engineer
Navy Yard, Mare Island, Calif

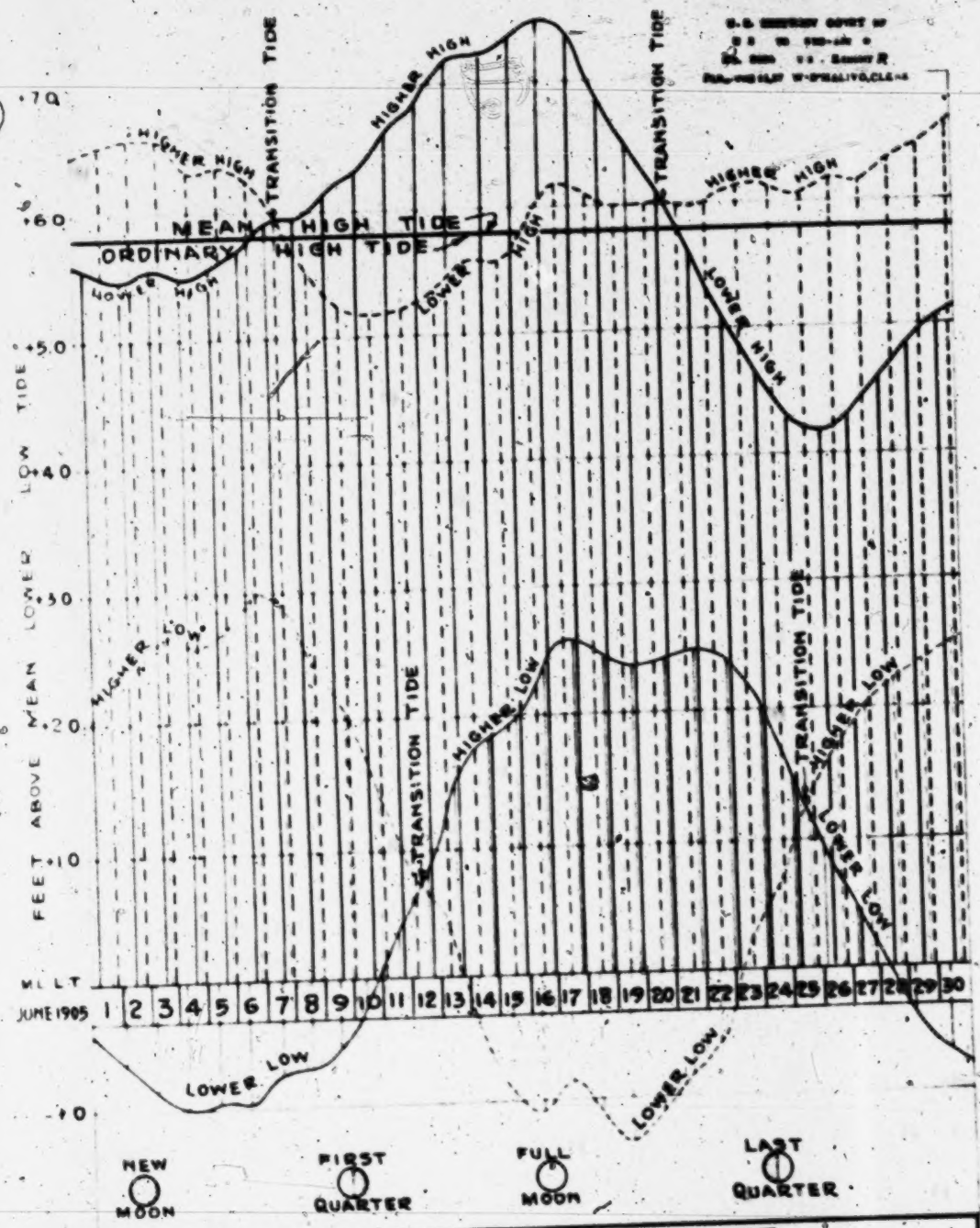
Under Direction of
C. A. Carlson
Captain, C.E.C., U.S. Navy
of the Bu. of Y. & D. Navy Dept. Wash. D.C.



NOTE:-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually High Tides

PLATE VI
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Rainy Season Month of
FEBRUARY 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENG'G. BLDG)

Compiled & Drawn by - John F. Greenhead Associate Civil Engineer Navy Yard, Mare Island Calif.	Under Direction of C. A. Carlson Captain C.E. U.S. Navy of the Bu. of Y. & D. Navy Dept. Wash. D.C.

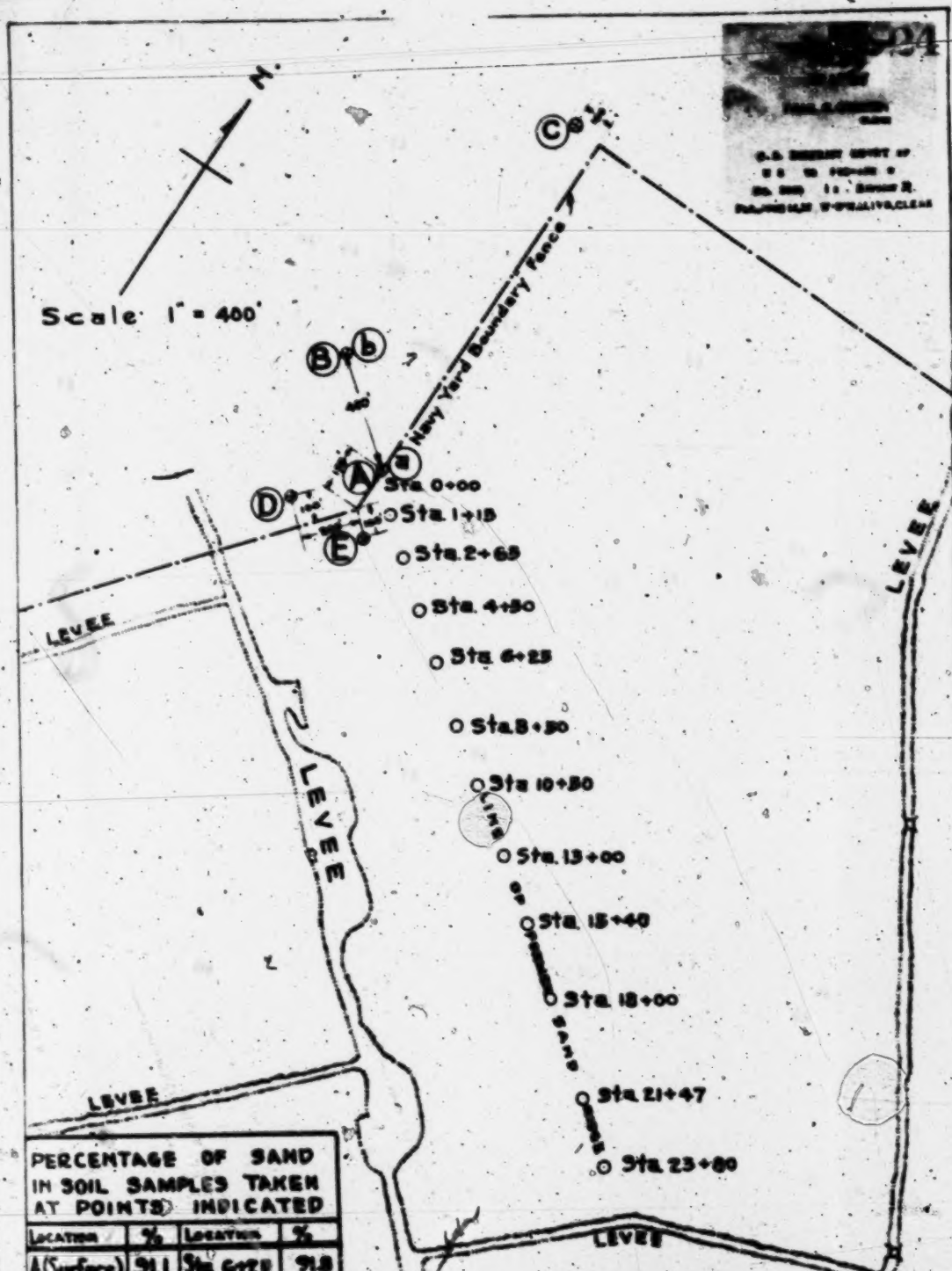


NOTE :-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually low Tides

PLATE VII
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Dry Season Month of
JUNE 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENGG. BLDG.)

Compiled & Drawn by
John F Greathead
Associate Civil Engineer
Navy Yard Mare Island Calif

Under Direction of
C. A Carlson
Captain C.E.C. U.S.Navy
of the Bu of Y&D Navy Dept Washington D.C.



PERCENTAGE OF SAND IN SOIL SAMPLES TAKEN AT POINTS INDICATED

Location	%	Location	%
A(Surface)	91.1	Sta. 6+25	91.8
a(1 ft. below)	83.3	Sta. 8+50	92.3
B(Surface)	96.8	Sta. 10+50	92.3
b(1 ft. below)	71.4	Sta. 13+00	93.8
C	0	Sta. 15+40	95.1
D	0	Sta. 18+00	72.4
E	0	Sta. 21+47	75.6
Sta. 1+15	95.3	Sta. 23+80	25.0
Sta. 2+65	92.2		
Sta. 4+50	94.2		

PLATE VIII

PRESENT SAND CONTENT OF SOIL ALONG LINE OF FORMER SAND RIDGE IN, AND NORTH OF S. & O.L. SURVEY No. 34

Compiled & Drawn by: John F. Greenhead, Associate Civil Engineer, Navy Yard, Mare Island, Calif.

Under Direction of: C. A. Carlson, Captain C.E.C.U.S. Navy of the Bn. of Y&D, Navy Dept. Wash. D.C.

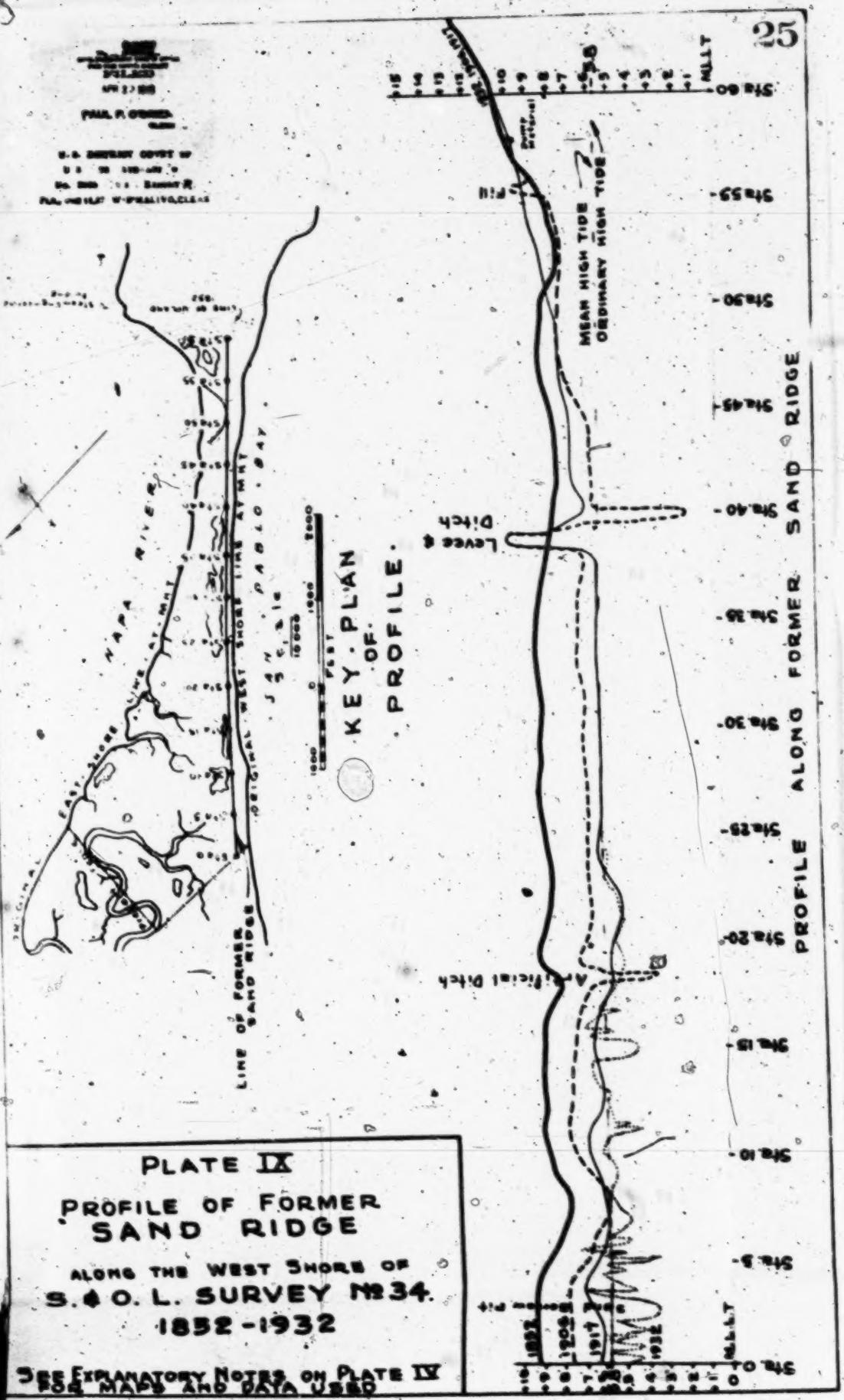


PLATE IX

PROFILE OF FORMER SAND RIDGE

ALONG THE WEST SHORE OF

S. & O. L. SURVEY No 34.

1852 - 1932

SEE EXPLANATORY NOTES ON PLATE IV FOR MAPS AND DATA USED

SAN PABLO BAY

BAY
DISTRICT
FILED
APR 2 9 1949
PAUL P. O'BRIEN
NOTE
Contours show the average elevation of the ground surface

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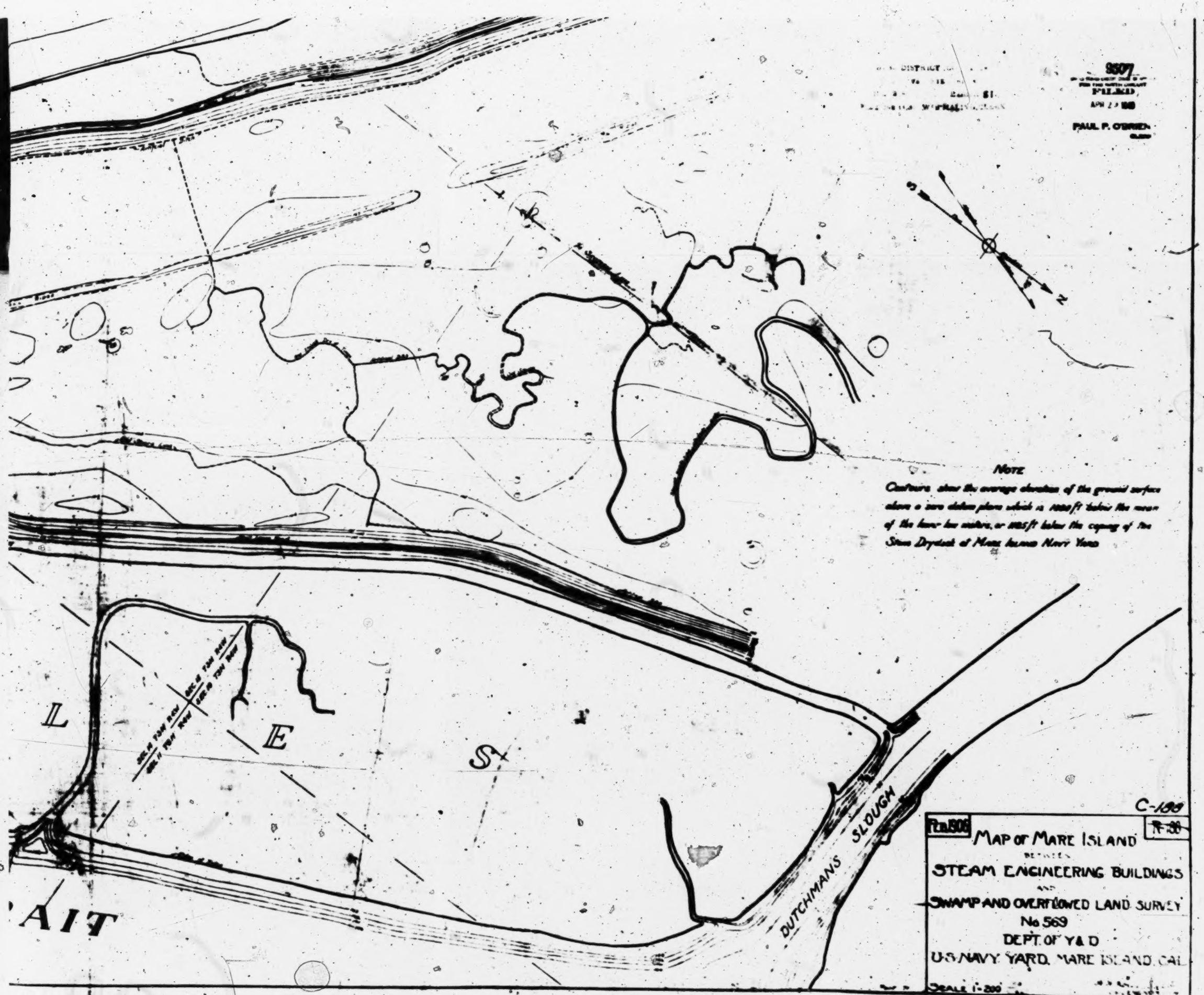
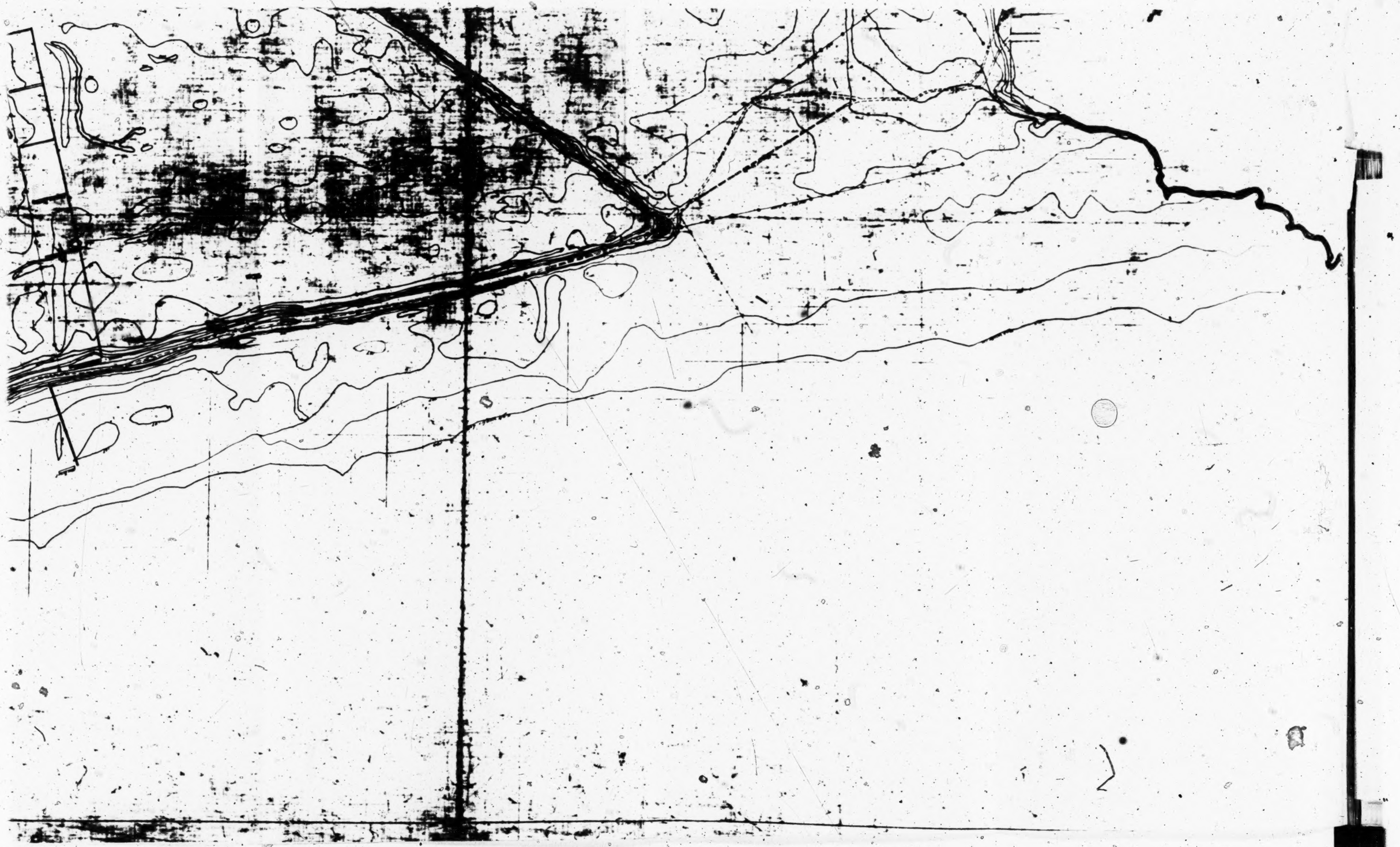
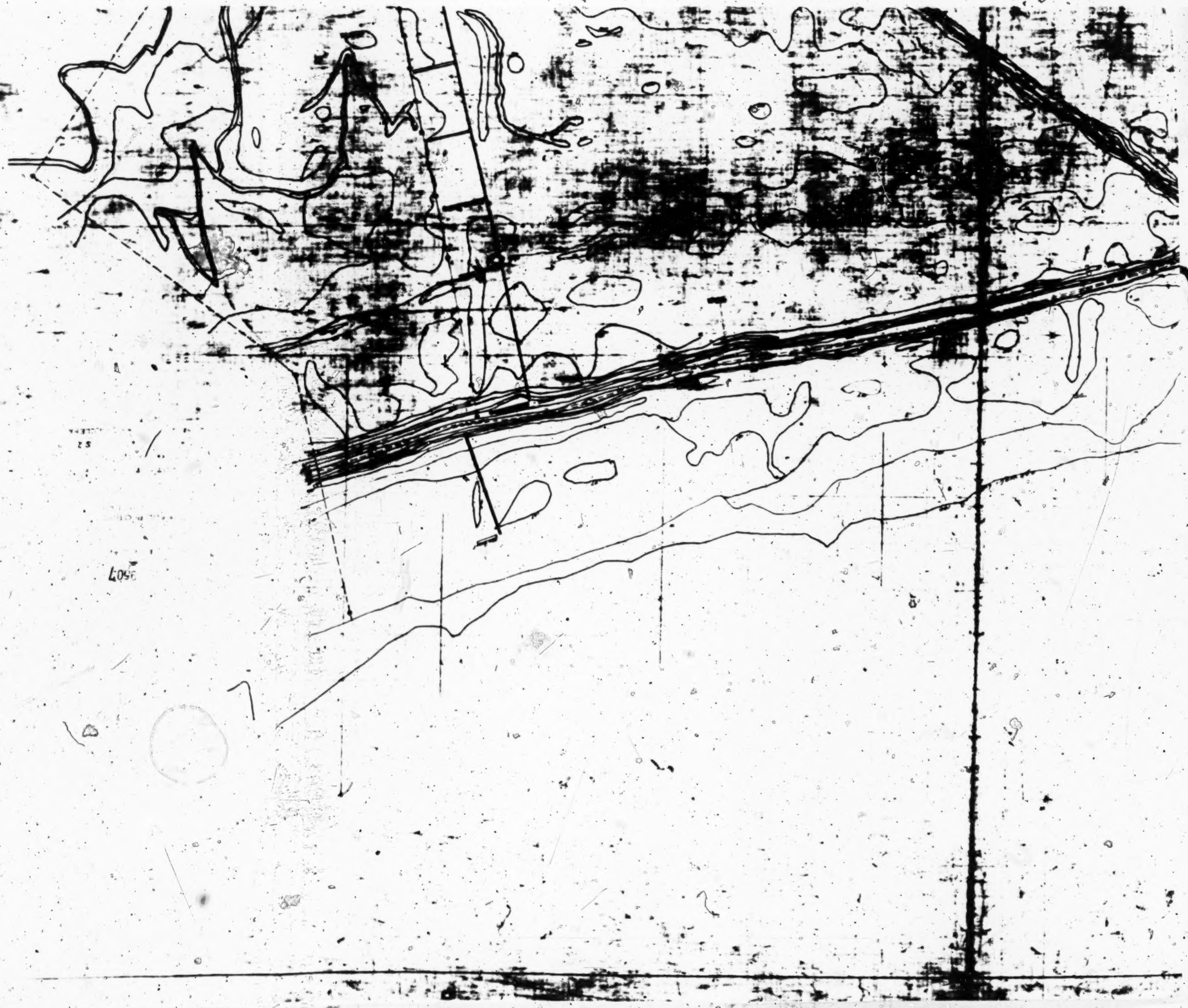
MARE ISLAND STRAIT

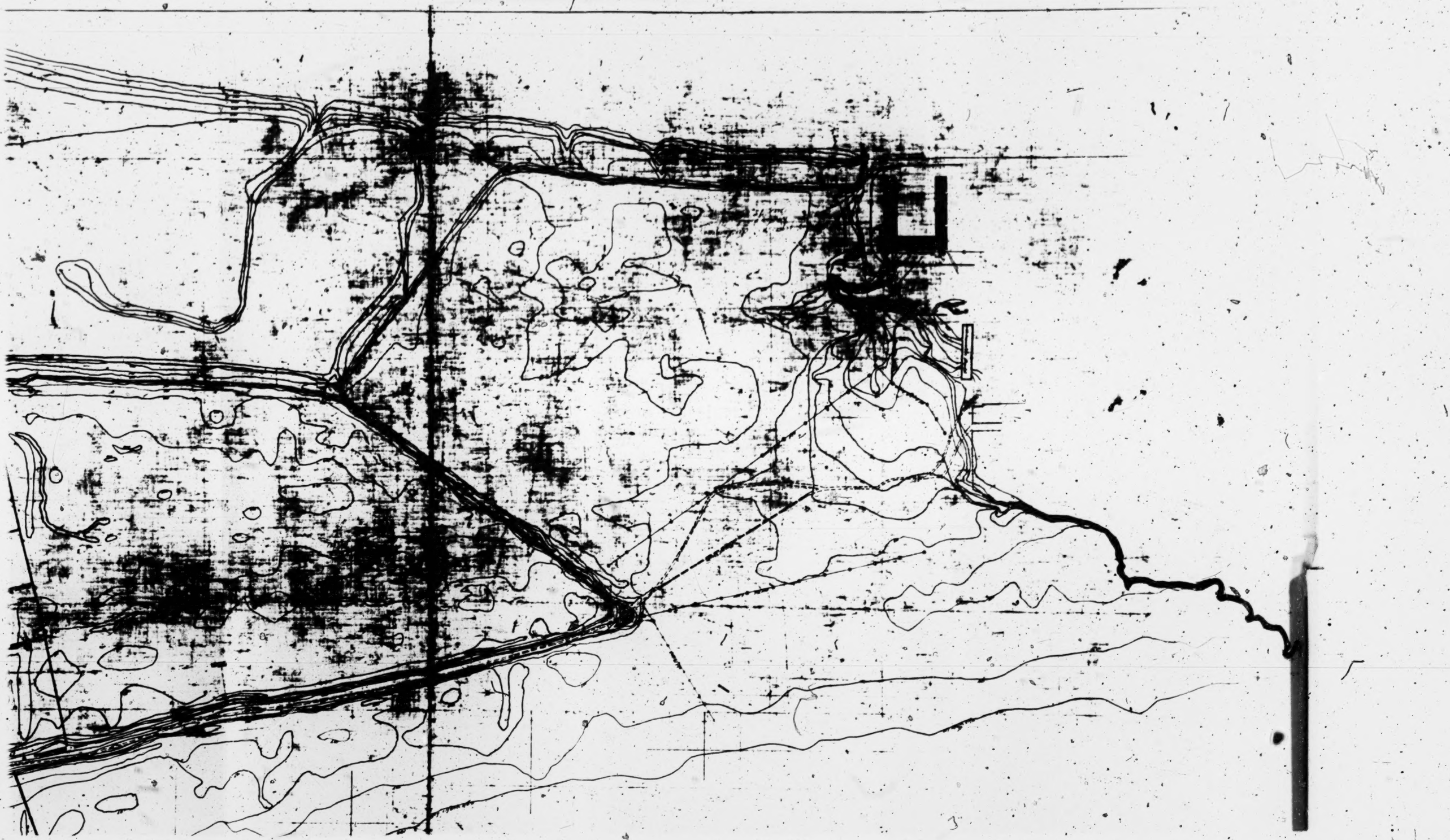


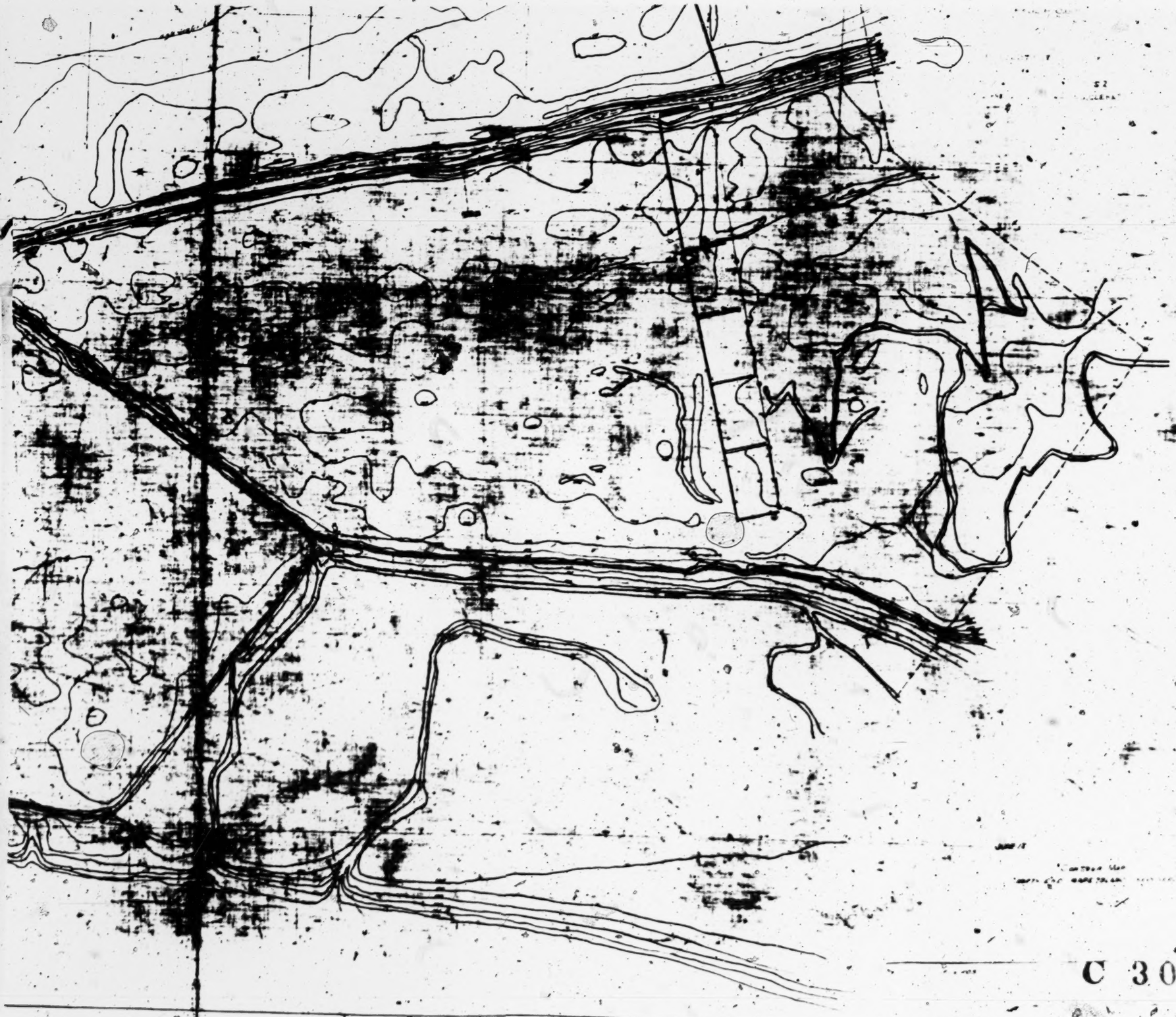
9507
FILED
PAUL P. O'BRIEN
NOTE
Contours show the average elevation of the ground surface above a zero datum plane which is 1000 ft below the mean of the lower low waters, or 1105 ft below the coping of the Stone Drydock at Mare Island Navy Yard
L
E
S
AIT
DUTCHMANS SLOUGH
C-188
Feb 1906
MAP OF MARE ISLAND
BETWEEN
STEAM ENGINEERING BUILDINGS
AND
SWAMP AND OVERFLOWED LAND SURVEY
No 569
DEPT. OF Y & D
U.S. NAVY YARD, MARE ISLAND, CAL
SCALE 1:200

C-188









C 30

SAN PABLO BAY

NAPA RIVER

STATION 2

+5.8 Mean High Tide
+5
+4
+3
+2
+1
MLLT

LEVEE | SAND RIDGE | Slough | Slough | Slough | LEVEE

1852
1906
1917
1931

ORIGINAL TIDELAND | ORIGINAL LOWLAND | TIDELAND

1500 1000 500 0 500 1000 1500 2000 2500

STATION 6+20

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | LEVEE

1852
1906
1917
1931

ORIGINAL TIDELAND | ORIGINAL LOWLAND | TIDELAND

STATION 10+40

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | Pond | LEVEE

1852
1906
1917
1931

ORIGINAL TIDELAND | ORIGINAL LOWLAND | ORIGINAL TIDELAND

STATION 13

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | Pond | Firing Point | Firing Point | Firing Point | LEVEE

1852
1906

ORIGINAL TIDELAND | ORIGINAL LOWLAND | ORIGINAL TIDELAND

STATION 19

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | LEVEE

1852
1906

ORIGINAL TIDELAND | ORIGINAL LOWLAND | ORIGINAL TIDELAND

STATION 21+50

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | LEVEE

1852
1906

ORIGINAL TIDELAND | ORIGINAL LOWLAND | ORIGINAL TIDELAND

STATION 24

+5.8 Mean High Tide
MLLT

LEVEE | SAND RIDGE | Pond | LEVEE

1852
1906

ORIGINAL TIDELAND | ORIGINAL LOWLAND | ORIGINAL TIDELAND

+5.8 Mean High Tide

LEVEE | SAND RIDGE | Pond | LEVEE

STATION
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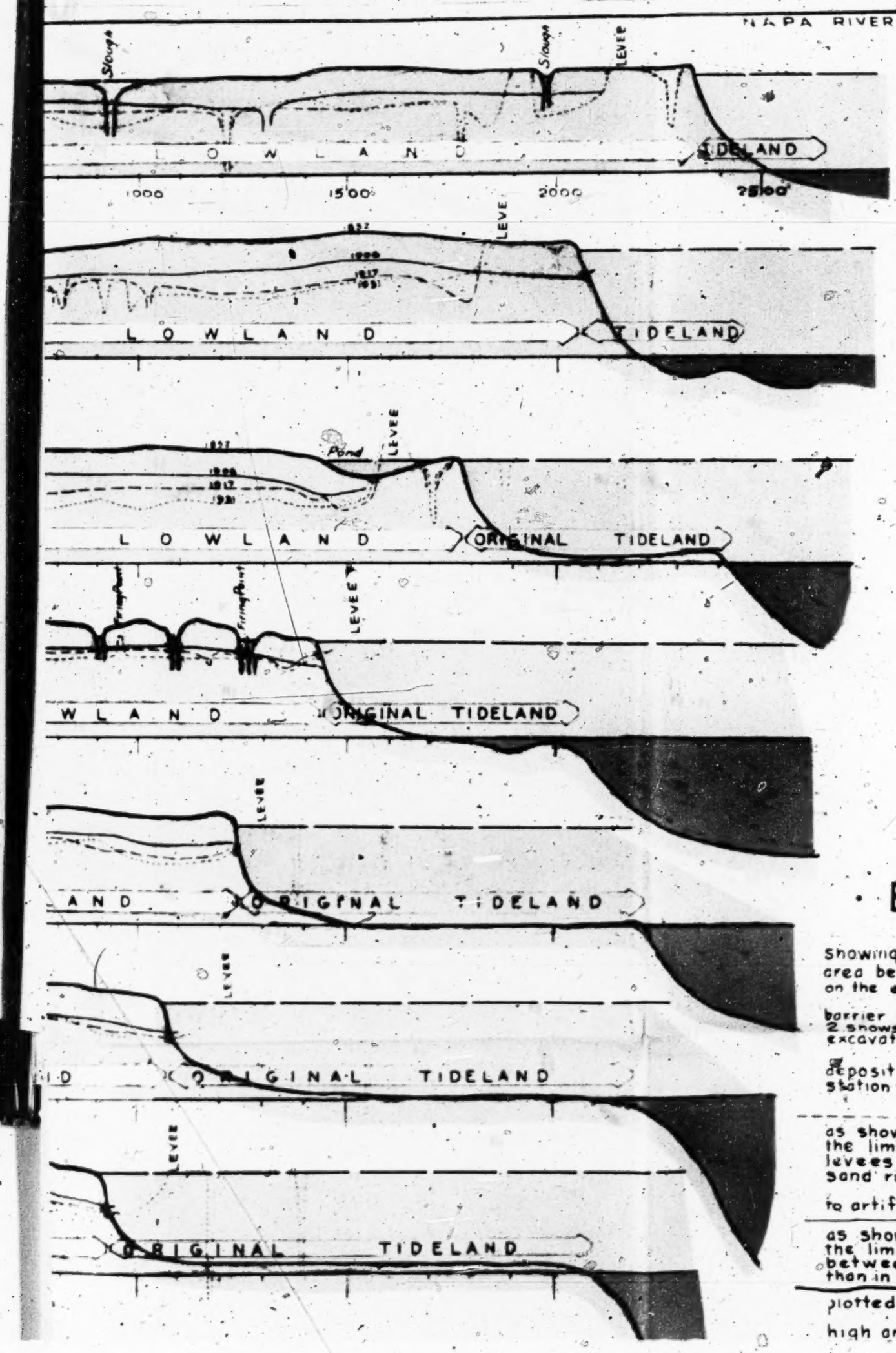
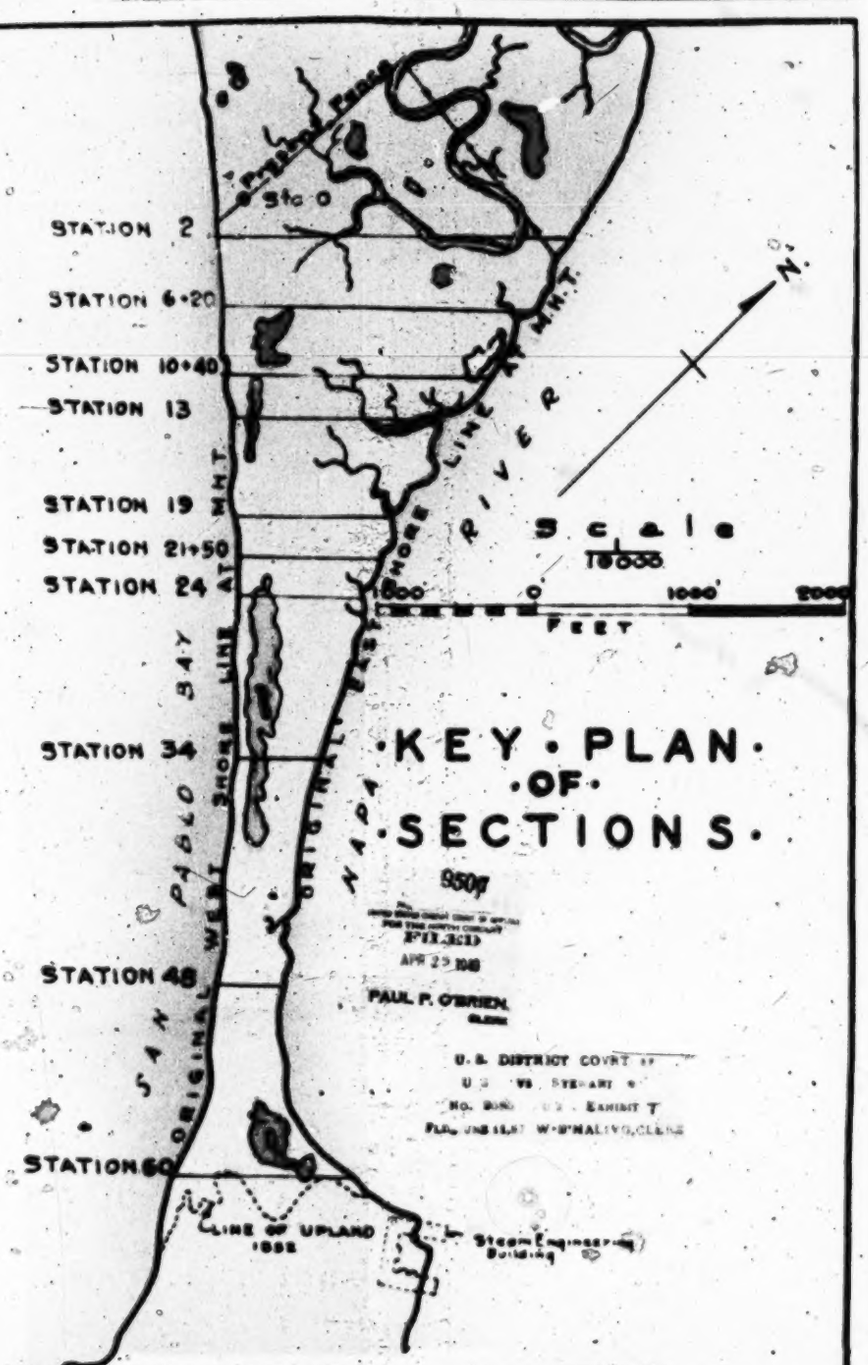
STATIONS

EXPLAN

1931
showing present elevati
area between levees as
on the east and west sic
Trace
barrier on the San Pablo B
2 shows the disturbed
excavation of sand at t
Area
deposit of spoil from c
station 48 is represent
NOTE
1917C
as shown on P.W. Map R-
the limits of the origi
levees lies at a highe
sand ridge is longer
Stat
to artificial fill.
1906
as shown on P.W. Map R
the limits of the orig
between the levees
than in either 1917 or
1852
plotted as follows:
(a) T





EXPLANATORY NOTES

1931 CROSS-SECTIONS – From a recent survey showing present elevation of land. Note sunken condition of the area between levees as compared to the normal height of accretions on the east and west side.

Traces still remain of the original sand ridge or barrier on the San Pablo Bay side. The irregular profile of station 2 shows the disturbed condition of the surface due to recent excavation of sand at that point.

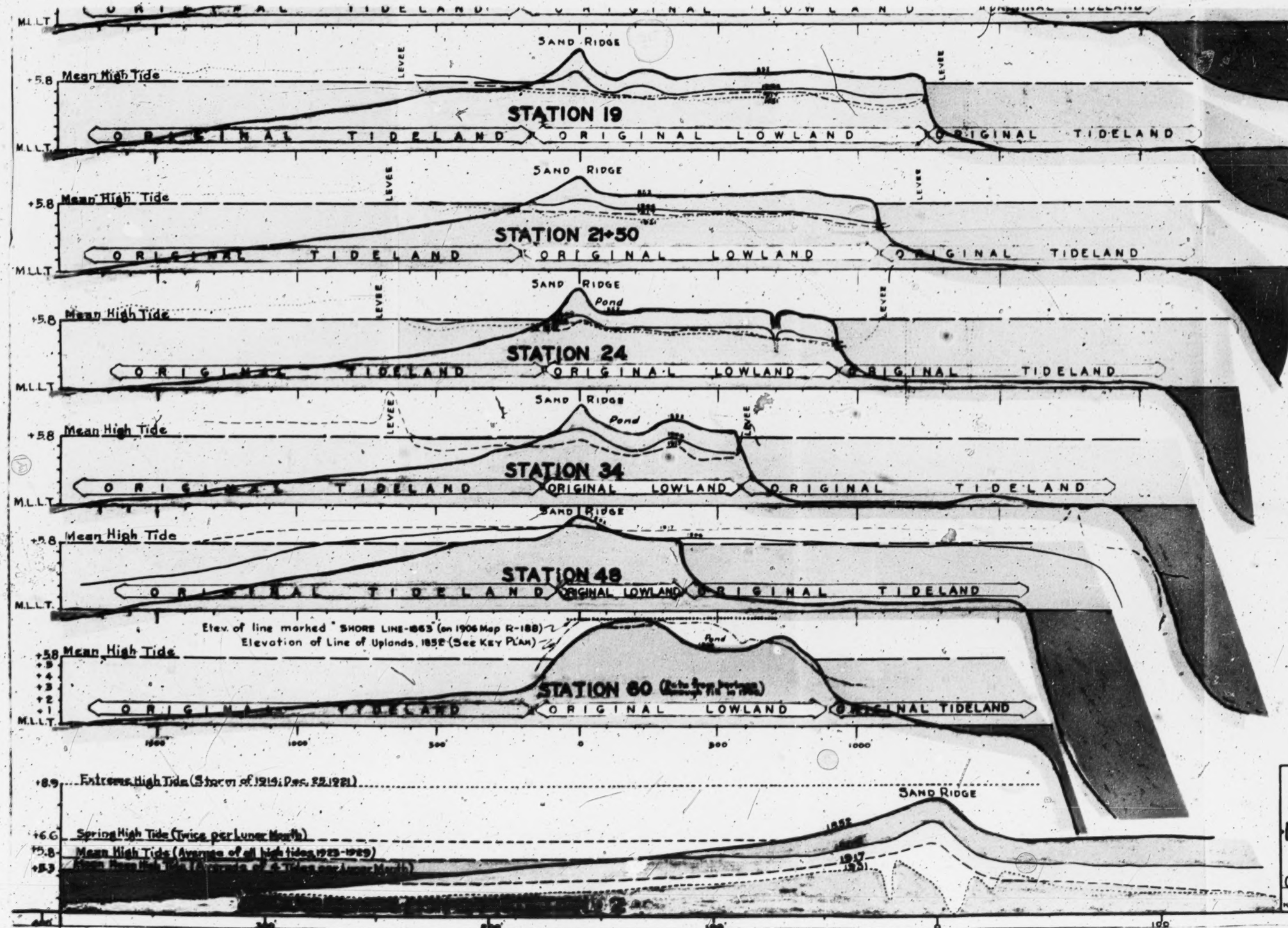
Area south of station 24 has been used for deposit of spoil from channel dredging. A cross-section at station 48 is representative for all of the sections in this area. NOTE that fill covers largely original tide lands.

1917 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-304 (C-304) of June 1917. Plotted within the limits of the original shore lines of 1852. Area between levees lies at a higher elevation than in 1931. Trace of sand ridge is longer and more prominent than in 1931. Station 48 shows an abnormal elevation due to artificial fill.

1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-188 (C-188) of Feb. 1906. Plotted within the limits of the original shore lines of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1931.

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plot[illegible]



STATION 60

EXPLANAT

1931 CRO
showing present elevation o
area between levees as con
on the east and west side.
Traces st
barrier on the San Pablo Bay s
2 shows the disturbed cond
excavation of sand at that p
Area so
deposit of spoil from chann
station 48 is representative
NOTE that
1917 CROS
as shown on P.W. Map R-304 (
the limits of the original s
levees lies at a higher e
sand ridge is longer and
Station
to artificial fill.
1906 CR
as shown on P.W. Map R. 188
the limits of the original
between the levees is f
than in either 1917 or 1931
1852 CR
plotted as follows:
(a) The
high and low water lines
U.S.C. & G.S. Chart and from
(Exhibits L-20 and L-21)
(b) The l
features are taken from the
The 1906 cross-Sections
found to retain correspond
drainage features.
Therefor
parallel to the 1906 profile
(c) It wil
unreclaimed low and tule la
elevation at least (1.4)
Pablo side and .67 of a
Napa River or east side
was also noted by the Slo
tule land east of the highlan
or barrier has been averaged
elevation of .67 of a foot
represents the lowest possib
east of the barrier or ridge
(d) A min
sand ridge has been deriv
section shown on the earl
defendants exhibit No 4).
all cross-sections restore
sand ridge to the shore li

RE -
Cross Secti
Elevation
Elevation

RE - ENLARG
1. Portion i
scale to make clearer the relat
to the crest.
2. Irregulari
sand excavation.

PLA
·PHYSICAL·CHANG
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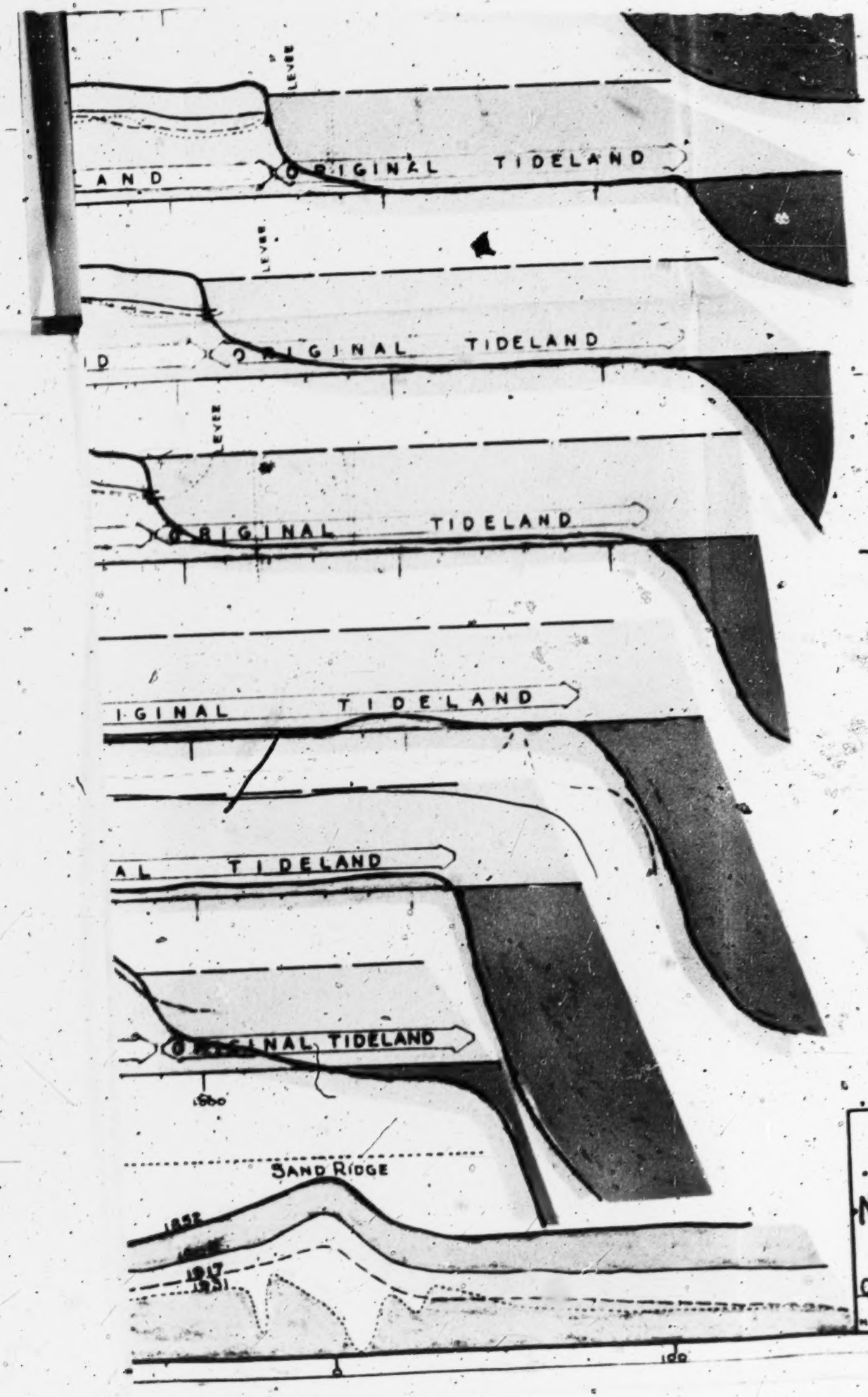
CROSS·SECTIONS·TAKEN·FROM·ACT

Surveyed and Plotted
Navy Yard, Mare Island, Calif. August, 1931



· EXPLANATORY · NOTES ·

1931 CROSS-SECTIONS – From a recent survey showing present elevation of land. Note sunken condition of the area between levees as compared to the normal height of accretions on the east and west side.

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Area south of station 24 has been used for deposit of spoil from channel dredging. A cross-section at station 48 is representative for all of the sections in this area. NOTE that fill covers largely original tide lands.

1917 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-304 (C-304) of June 1917. Plotted within the limits of the original shore lines of 1852. Area between levees lies at a higher elevation than in 1931. Trace of sand ridge is longer and more prominent than in 1931.

Station 48 shows an abnormal elevation due to artificial fill.

1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-188 (C-188) of Feb. 1906. Plotted within the limits of the original shore lines of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1931.

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1856 U.S.C. & G.S. Chart and from the replotting of the original notes (Exhibits L-20 and L-21).

(b) The locations of sloughs, ponds and drainage features are taken from the 1851-8 surveys of U.S.C. & G.S. The 1906 cross-sections, although lower in elevation, were found to retain corresponding locations of sloughs, ponds and drainage features.

Therefore, the 1852 profile has been drawn parallel to the 1906 profile.

(c) It will be noted on every section that the unreclaimed low and tule land outside the levees builds up to an elevation at least (1.4) of a foot on the west or the San Pablo side and .67 of a foot above mean high waters on the Napa River or east side. The latter elevation of .67 of a foot was also noted by the Sloat Board of 1852 with respect to the tule land east of the highlands. The area east of the sand ridge or barrier has been averaged in the 1852 cross-sections at an elevation of .67 of a foot above mean or ordinary high water and represents the lowest possible elevation of the low and tule land east of the barrier or ridge.

(d) A minimum elevation for the crest of the sand ridge has been derived from the least disturbed cross-section shown on the earliest contour survey (Feb. 1906; defendant's exhibit No. 4). The use of this elevation on all cross-sections restores the original relation of the sand ridge to the shore line at mean high water.

RE - STATION 60:
Cross Section thru neck of land in 1852
Elevation of LINE OF UPLANDS 1852
Elevation of SHORE LINE 1852
DATA FROM BORINGS MADE IN 1906

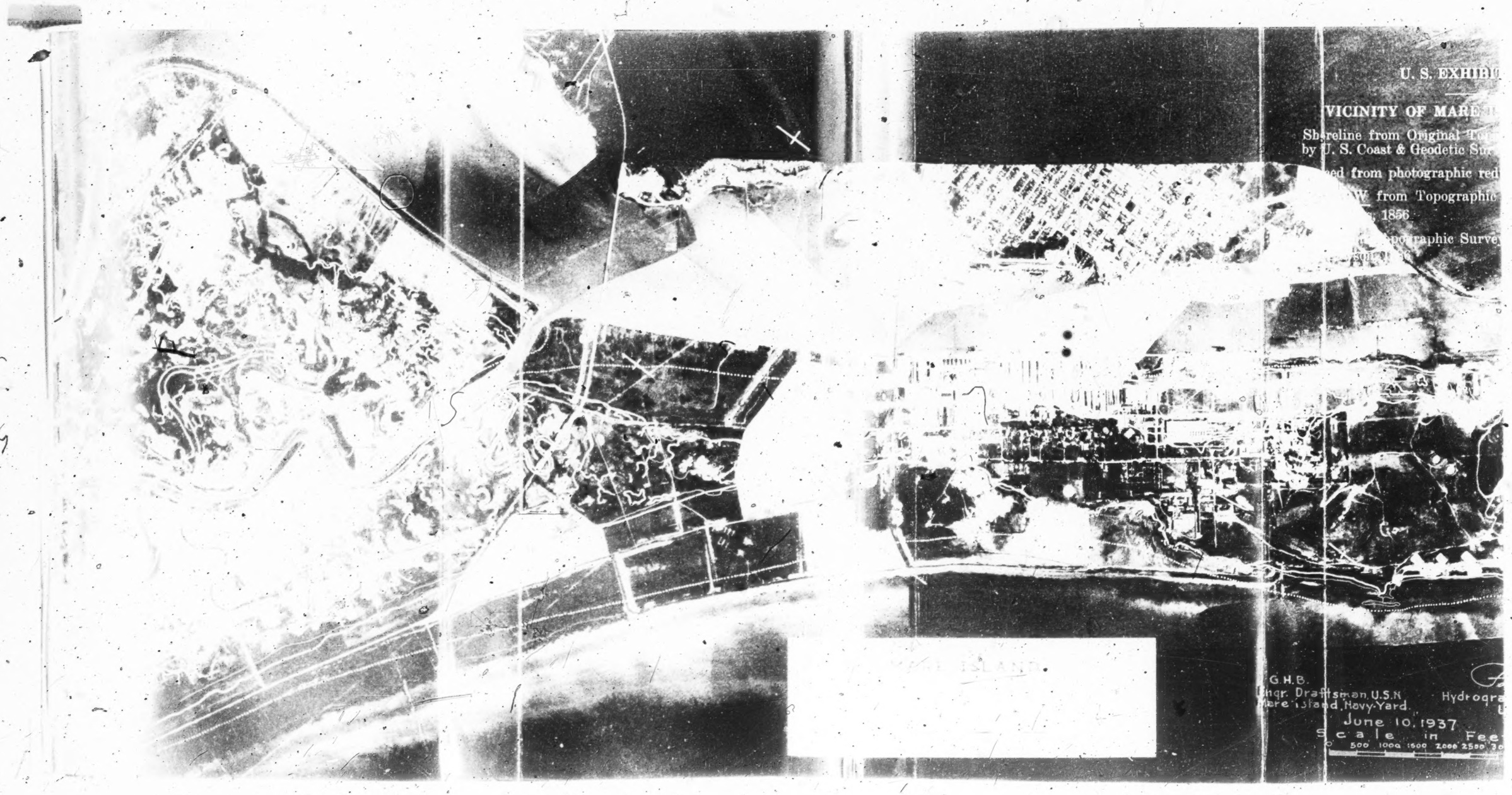
RE - ENLARGED SECTION AT STATION 2:
1. Portion including Sand Ridge redrawn to a larger scale to make clearer the relation of various Tidal Levels (and frequency) to the crest.
2. Irregularity at Sand Ridge in 1931 due to recent sand excavation

PLATE
· PHYSICAL · CHANGES · IN · THE · LOWLANDS · NORTH · OF · THE · UPLANDS · OF · MARE · ISLAND · · FROM · 1852 · TO · 1931 ·

CROSS SECTIONS TAKEN FROM ACTUAL SURVEYS IN 1852 · 1906 · 1917 · 1931

Surveyed and Plotted by [illegible]
Navy Yard, Mare Island, Calif. August 1931

Under direction of: [illegible]
of the Bureau of Yards & Docks, Navy Department, Washington, D.C.


U. S. EXHIBI
VICINITY OF MARE
Shoreline from Original To
by U. S. Coast & Geodetic Sur
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from Topographic
1856
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G.H.B.
Engr. Draftsman, U.S.N.
Mare Island Navy-Yard.
Hydrogra
June 10, 1937
Scale in Fee
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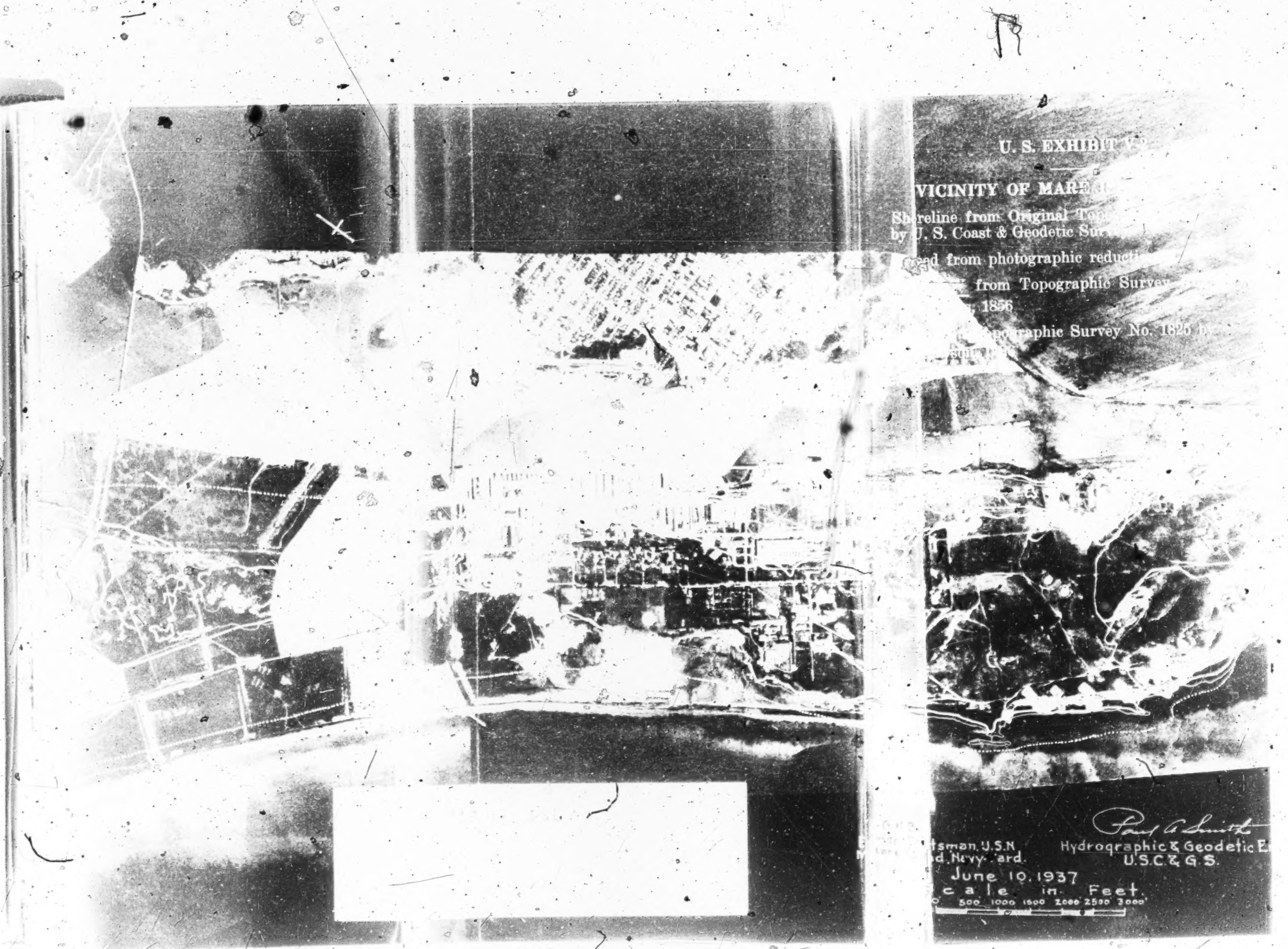
U. S. EXHIBIT
VICINITY OF MARE
Shoreline from Original Topo
by U. S. Coast & Geodetic Su
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1856
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d. Navy Yard.
Hydrographic & Geodetic E
U.S.C.&G.S.
June 10, 1937
cale in Feet
500 1000 1500 2000 2500 3000'

Plaintiff's Exhibit W
Map from Bancroft's History

CENTRAL CALIFORNIA IN 1848.

(5)

U.S. EXHIBIT "I"

U. S. COAST AND GEODETIC SURVEY.

F.M.Thorn Superintendent.

Section: X

State: Cal'a.

DESCRIPTIONS OF STATIONS.

LOCALITY

San Pablo Bay and Vicinity.

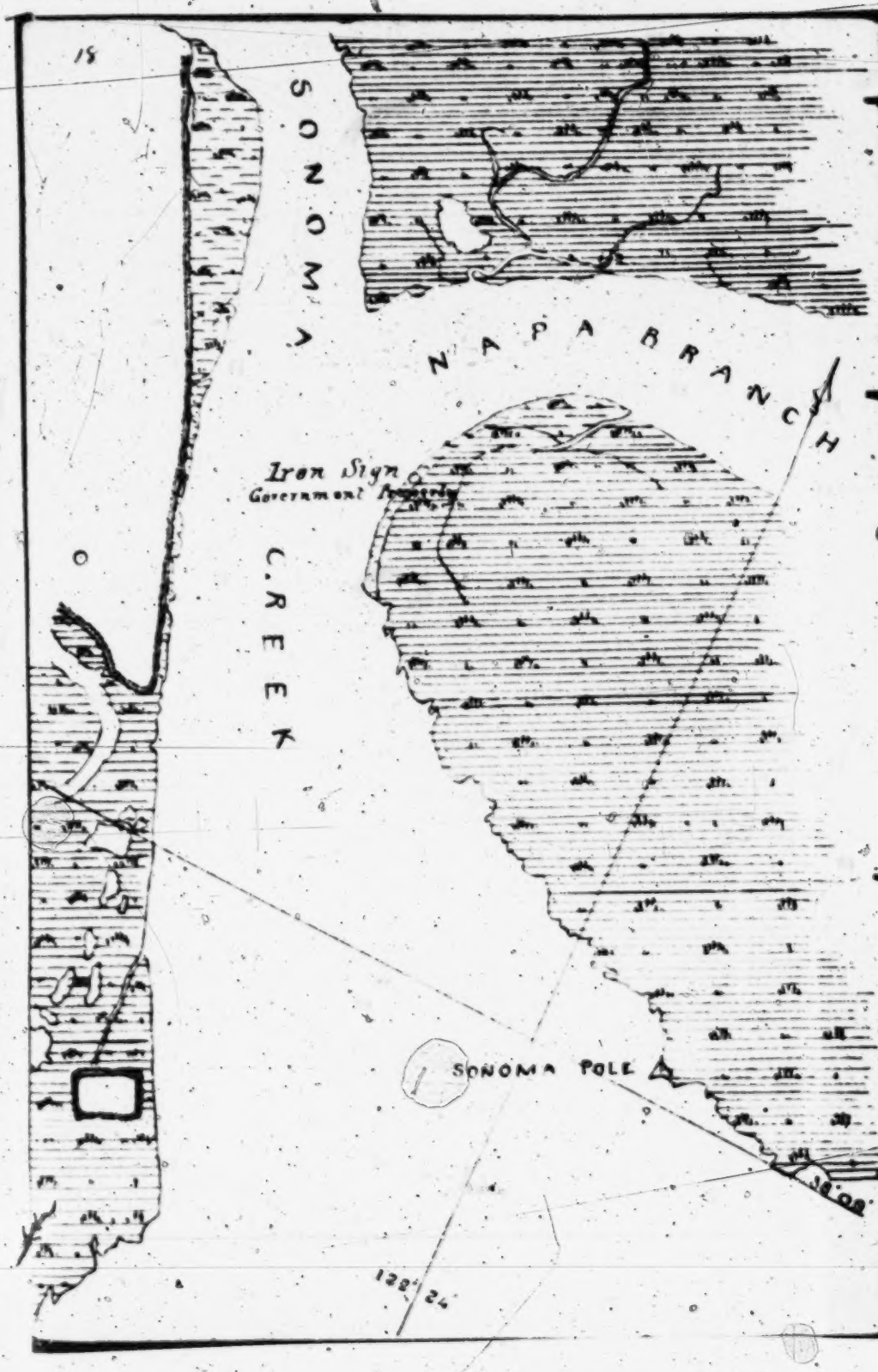
Original

1886-7

Chief of Party.

Jas. G. Lawson

Pat. I.


18
SONOMA
C. REEK
NAPA BRANCH
Iron Sign
Government Property
SONOMA POLE
38° 08'
122° 24'

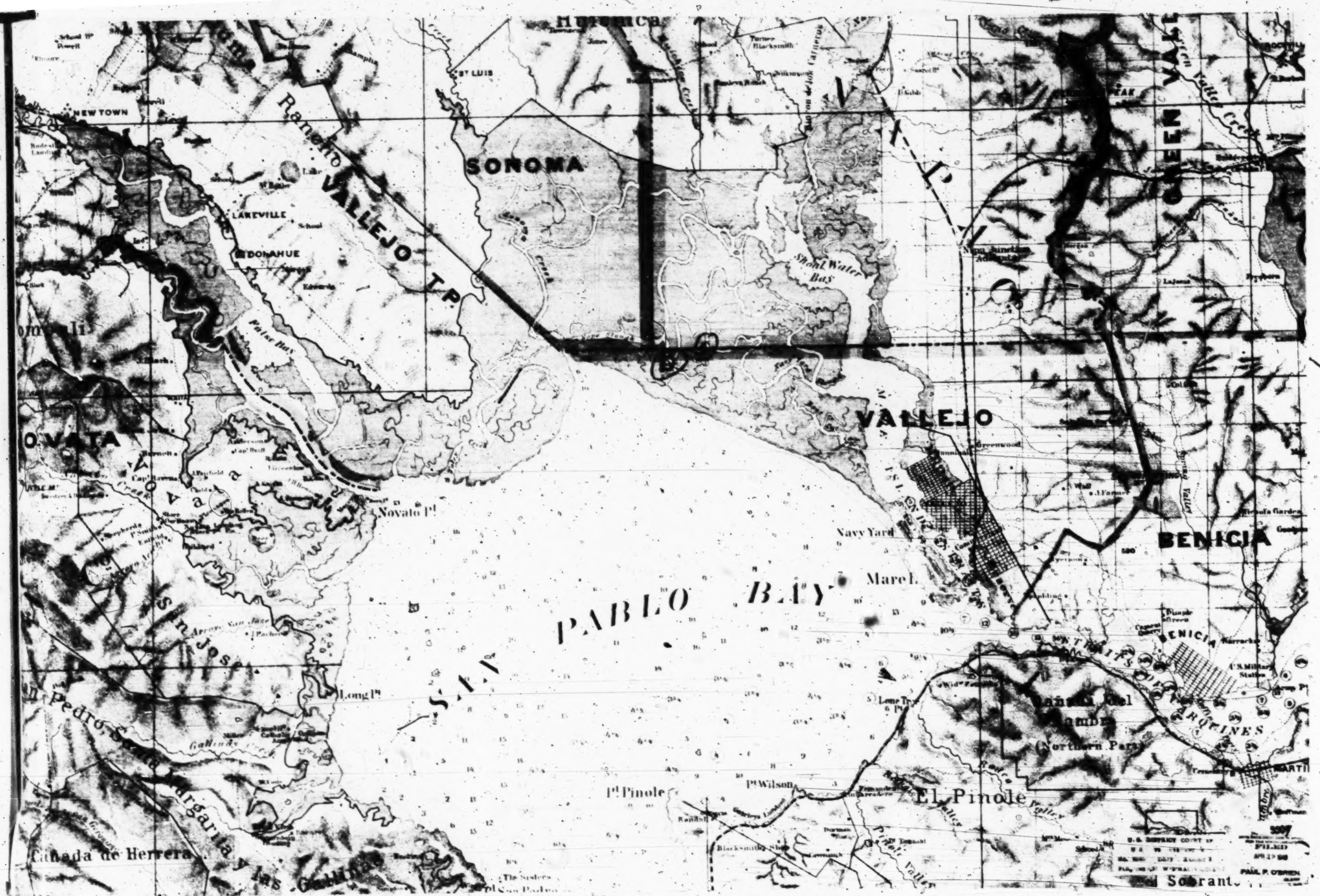
19

Sonoma Pole.
Solano County Cal.

September 25th 1886. — This is a piece of square timber 10×10 in. and 16 ft. high found standing on E. side of the mouth of Sonoma Creek. For what purpose it had been used could not be ascertained. A piece of 2×4 scantling, 4 ft. long, was nailed to the top of this timber, and the position determined for topographical and hydrographic use.

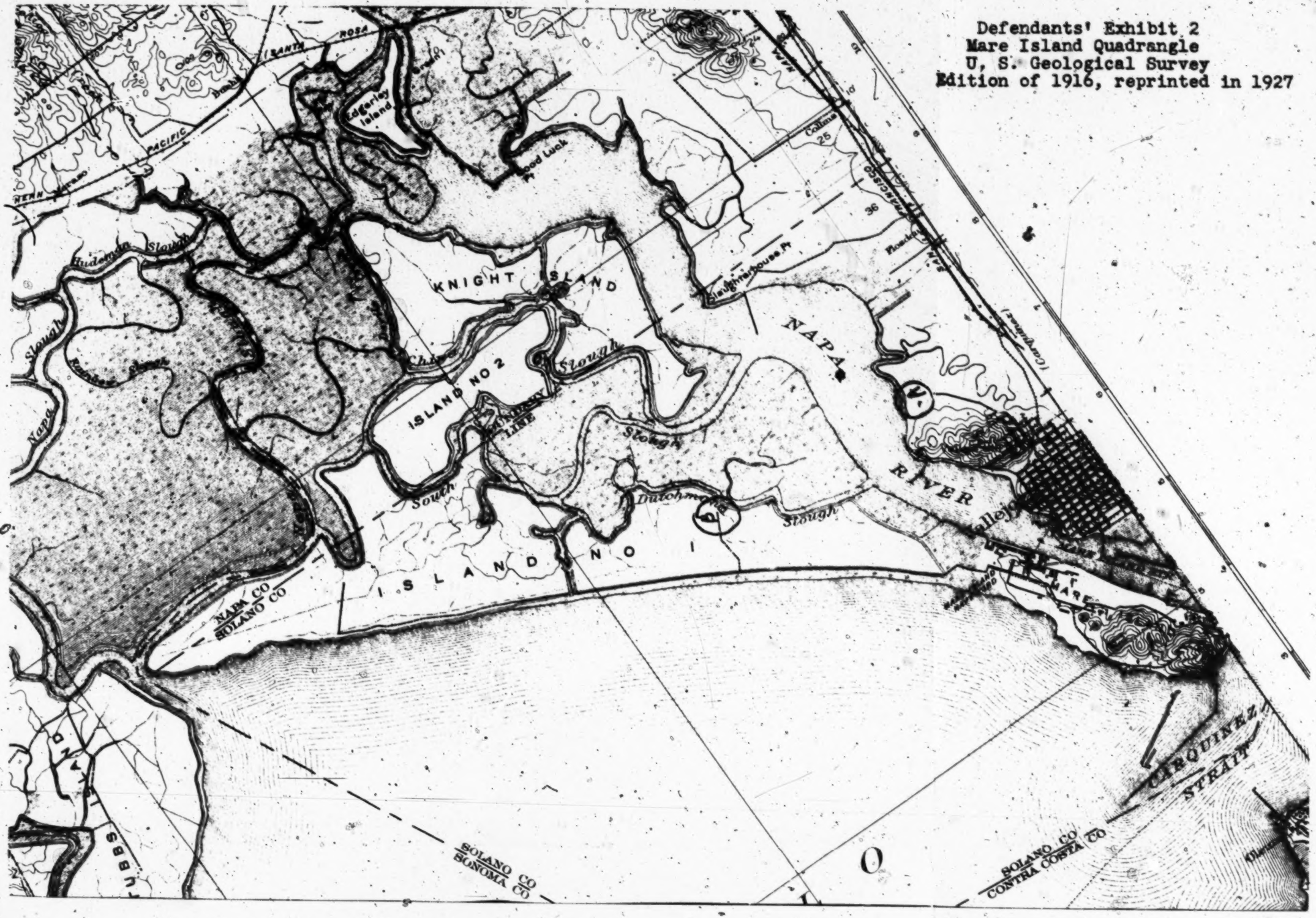
9507
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 2 1940
PAUL P. O'BRIEN
CLERK

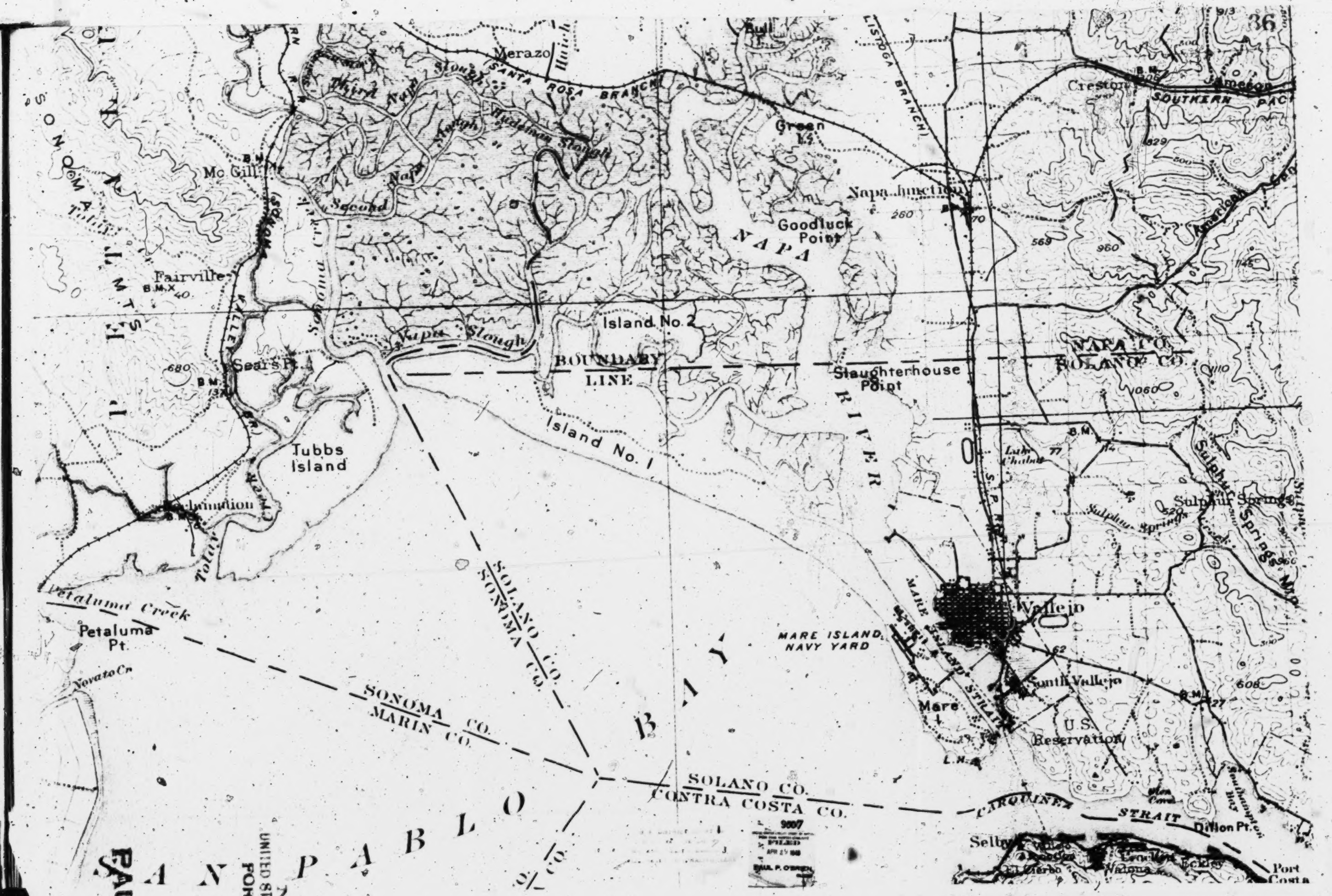
U. S. DISTRICT COURT OF
U. S. VS STEWART
No. 9685 EXHIBIT
FLD. JUNE 1937 W. B. MALIVIL, CLERK



SONOMA
VALLEJO
VALLEJO TP.
Rancho
NEW TOWN
LAKEVILLE
DONAHUE
ST LUIS
Shoal Water Bay
False Bay
Novato Pt
Navy Yard
Mare I.
SAN PABLO BAY
BENICIA
Long Pt
Pt Pinole
Pt Wilson
El Pinole
Cañada de Herrera
Sobrante

Defendants' Exhibit 2
Mare Island Quadrangle
U, S. Geological Survey
Edition of 1916, reprinted in 1927





36
Merazo
SANTA ROSA BRANCH
LISTOGA BRANCH
Creston
SOUTHERN PAC
Green I.
Napa Junction
Goodluck Point
NAPA
Mc Gill
Second
Third Napa Slough
Hudeman Slough
Fairville
Napa Slough
Island No. 2
BOUNDARY LINE
Slaughterhouse Point
NAPA CO.
SOLANO CO.
Sears Pt.
Tubbs Island
Island No. 1
RIVER
Sulphur Springs
Sulphur Springs Mtn
Vallejo
MARE ISLAND NAVY YARD
South Vallejo
Mare I.
U.S. Reservation
Petaluma Creek
Petaluma Pt.
Novato Cr
SOLANO CO.
SONOMA CO.
SONOMA CO.
MARIN CO.
SOLANO CO.
CONTRA COSTA CO.
CARQUINEZ STRAIT
Dillon Pt.
Selby
Port Costa
SAN PABLO BAY
UNITED ST
FOR

County Surveyors Office
Solano County Cal

37

V.W

IV.W

Swamp And Overflowed Lands

Survey No 569
Townships 3 and 4 North
Ranges 4 and 5 West
Sections 3.4.5.6.7.8.9.16 and 17 in T3N R4W
and 2 in 3N 5W. 31.32.33 and 34 in T4N 4W
26.27.34.35 and 36 in T4N 5W

Fractional Section 3 Entire 4.5. Fractional 6.7.8 and 9. W 3/4 of
W frac of N½ of 16 and N frac of SE ¼ of 16 and Small frac in NE ¼ of NW ¼ of 17 T3N R4W
Fr Sections 1 and 2 in 3N 5W. Entire Sections 31.32.33. NW fr ¼ of 34 T4N R4W
S frac of SE ¼ & S frac of SW ¼ of 26. S frac of SW ¼ & S frac of SE ¼ of 27. and Fractional Sections 34 & 35 and Entire 36 in T4N R5W

Base and Meridian of Mount Diablo

Certificate

Surveyed in 1869
For Jacob H. Hinkley

Field Notes

Beginning at a Stake on the West Bank of Napa Bay 32 Chains West of the Northeast Corner of Section 30 T4N R5W Running thence West on Section lines 322.00 chains to a Stake on the South Bank of Ruchias Creek at the Northeast corner of Section 25 T4N R5W. Thence with said Bank as follows N73½° W 38.00 chains, N75° W 82.50 chains N84° W 33.00 chains S60° W 7.50 chains to Section line S05° W 11.50 chains S22° W 13.50 chains to the County line. S4° W 10.50 chains to San Pablo Bay, S44° E 15.50 chains S67° E 32.00 chains S75° E 62.00 chains S6° E 76.50 chains S63° E 62.50 chains S63.50 E 61.00 chains S67.00 E 63.50 chains S69° E 57.50 chains S67.00 E 67.50 chains N66° E 67.00 chains S80° E 60.50 chains to the West line of Swamp Land Survey No 34. Thence South along said line 22.33 chains to a point 10 chains South of the center of Section 10 T3N R4W, Thence East along the South line of said Survey 30.00 chains to the Bank of Napa Bay. Thence along said Bank N12½° W 20.50 chains to the mouth of Sulphur Creek Slough. N28° W 16.00 to South Slough N30° W 12.00 chains. N75° W 17.00 chains. N25° W 4.50 chains N12° W 63.50 chains to the Place of Beginning Containing 741.57 Acres of Land. Also By the Base Meridian & Magnetic Variation 16.2° East. 73

The grants herein lying and situate in Solano County surveyed in accordance with the Act of the Legislature Concerning State Lands Approved March 28th 1868 and the Instructions of the Surveyor General

(Wm Wayne Toland) County Surveyor of Solano County

Certified to be a correct Copy of the Original Record in my Office

(Wm Wayne Toland), County Surveyor of Solano County.

San Pablo Bay

Napa Bay

Mare Island Navy Yard

Napa

Slaughterhouse Point

Sulphur Creek

Sulphur Creek Slough

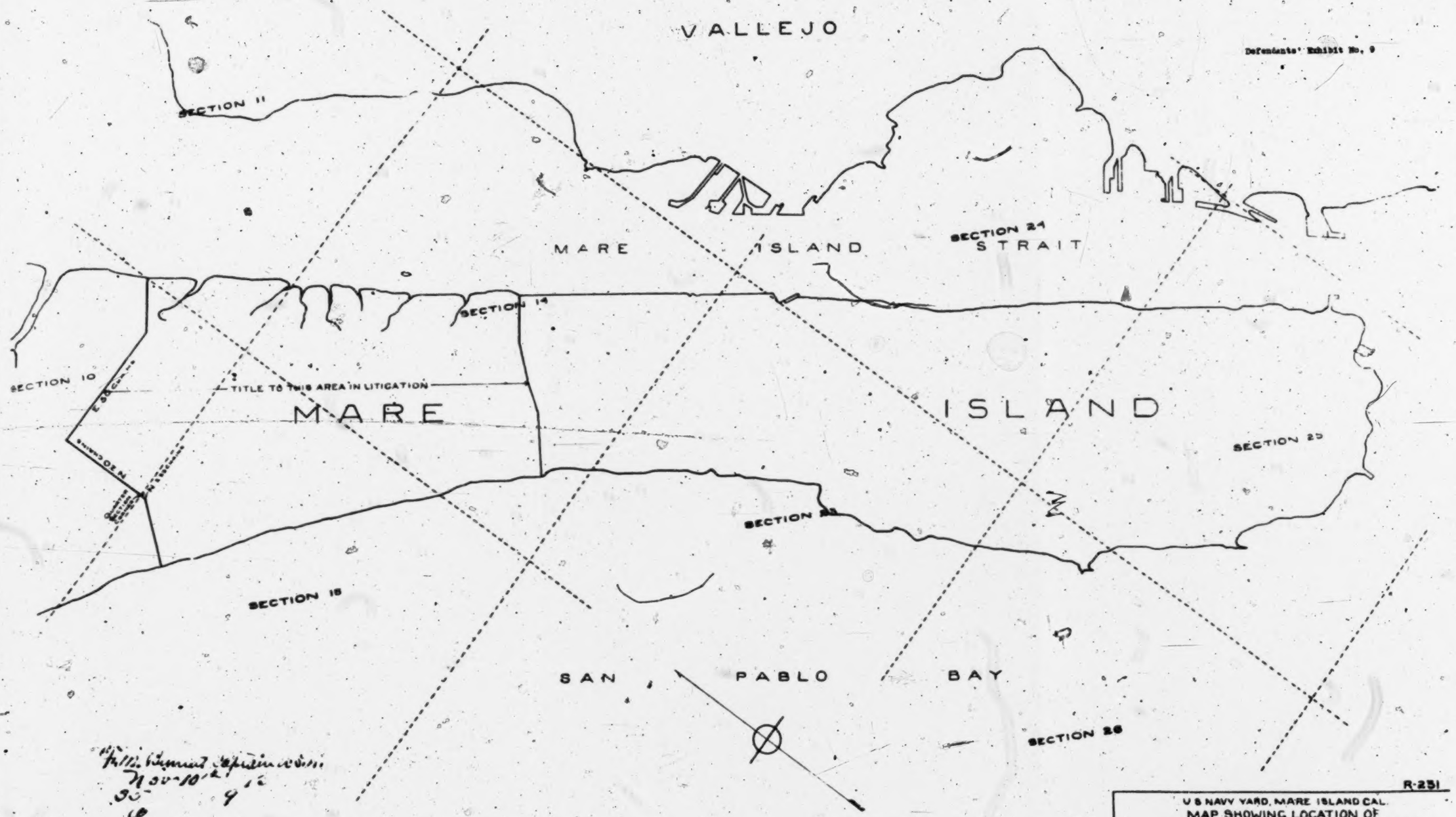
Ruchias Creek

Napa Slough

Napa Creek

Section lines between Solano and Napa Counties

Defendants' Exhibit No. 9



R-231

U S NAVY YARD, MARE ISLAND CAL.
MAP SHOWING LOCATION OF
U.S. NAVAL RESERVATION.
MARE ISLAND, VALLEJO, CAL.
BEING FRACTIONS OF SECTIONS
10, 11, 14, 15, 23, 24, 25, 26, T-3-N-R-4-W-MDM.

OCT. 1913.

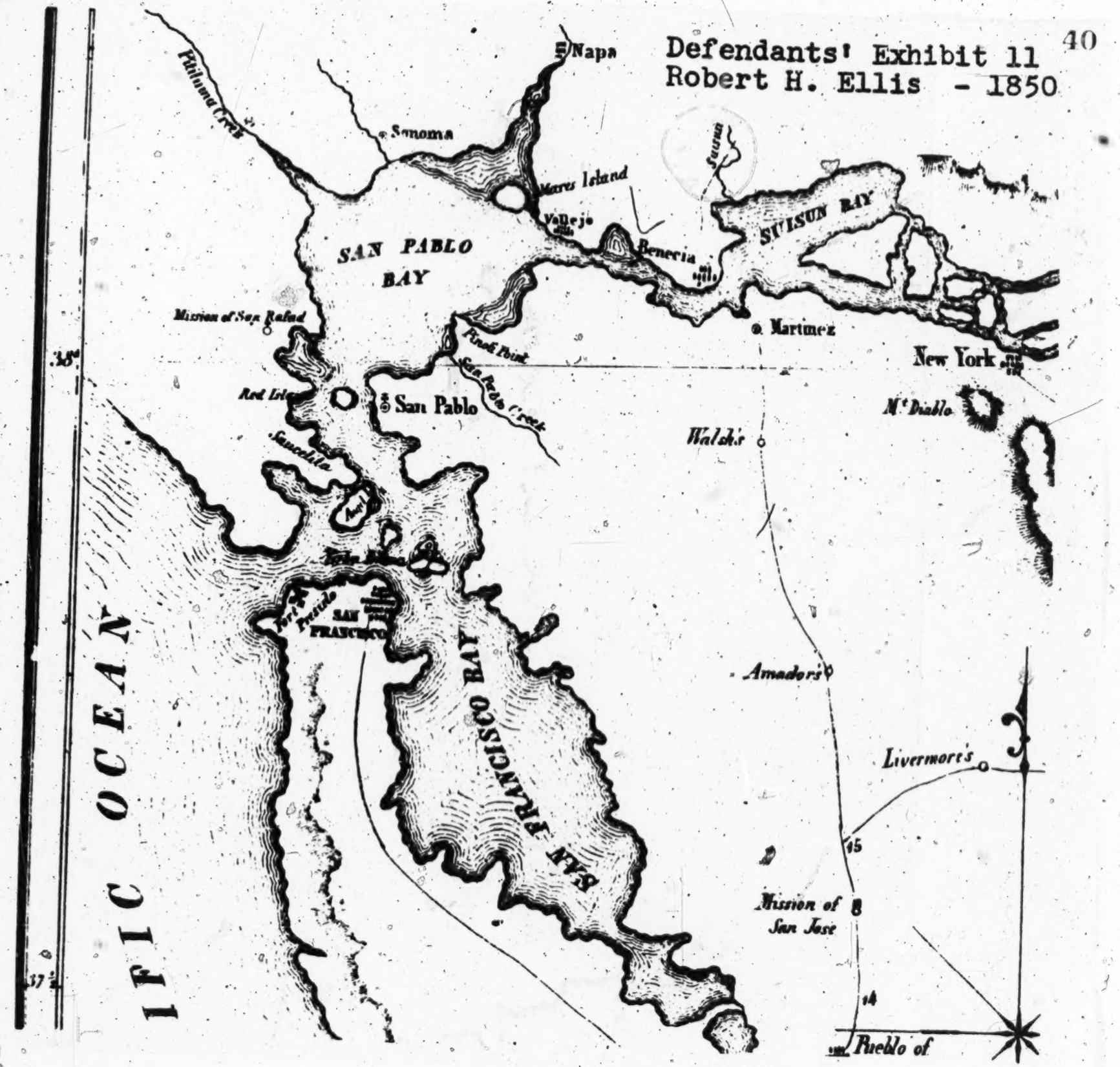
CIVIL ENGINEER, U.S.N.
PUBLIC WORKS OFFICER

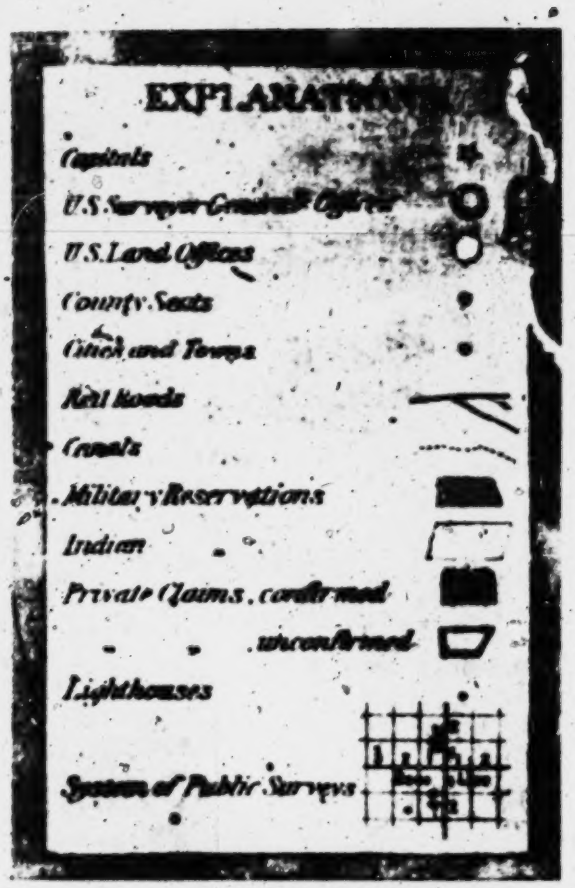
9507

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 2 9 1940
PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COURT OF
U. S. vs STEWART
No. 2080 DEPT. EXHIBIT 10.
FOLLOWING TO WITH MAL

Defendants' Exhibit 11
Robert H. Ellis - 1850



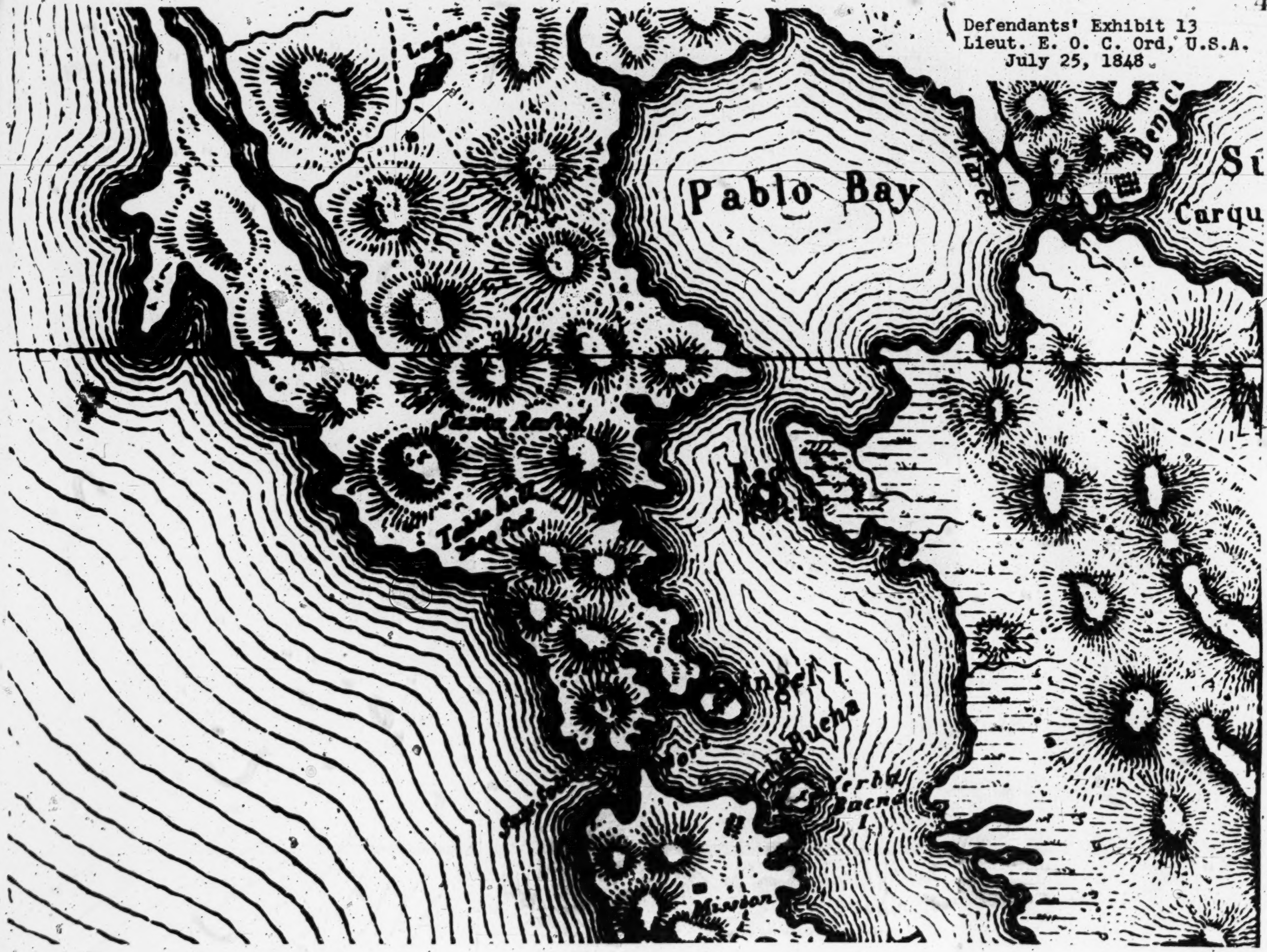


7

FOR THE NINTH CIRCUIT
FILED
APR 29 1949
PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COURT OF
U. S. VS STEWART
NO. 8686 DEPT. EXHIBIT
FLD. JUNE 11, 37 W. B. MALIVO, CLERK

Defendants' Exhibit 13
Lieut. E. O. C. Ord, U.S.A.
July 25, 1848.



Defendant's Exhibit 14.
Official Map of Solano County
1890.

OFFICIAL MAP
OF THE
COUNTY OF SOLANO
CALIFORNIA

SHOWING

MEXICAN GRANTS UNITED STATES GOVERNMENT SWAMP LAND SURVEYS
PRESENT PRIVATE LAND OWNERSHIPS

ROADS & RAIL ROADS.

COMPILED BY E. N. EACER. COUNTY SURVEYOR

APPROVED BY THE BOARD OF SUPERVISORS
APRIL 7TH 1890

SUPERVISOR 2ND DIST. R. J. R. Ader CHAIRMAN.
1ST " E. McCattigan
3RD " Peter Siebe
4TH " D. K. Corn
5TH " Jas. A. [illegible]

Attest Joel A. Harvey
Clerk

CORRECTED TO JULY 1ST 1890
E. N. Eager
Co. Surveyor

Defendant's Exhibit 14.
Official Map of Solano County
1890.

DEFENDANTS' EXHIBIT 15

15

OFFICIAL MAP

OF THE

COUNTY OF SOLANO

CALIFORNIA

SHOWING

MEXICAN GRANTS & U.S. GOV. AND SWAMP LAND SURVEYS

PRESENT PRIVATE LAND OWNERSHIPS

ROADS & RAIL ROADS

COMPILED BY E. N. EAGER EX COUNTY SURVEYOR

OWNERSHIPS FURNISHED BY SOLANO COUNTY ABSTRACT CO.

APPROVED BY THE BOARD OF SUPERVISORS

MARCH 1st 1909

1st DIST. CHAIRMAN

2nd "

3rd " J. E. Gleudon

4th "

5th "

ATTEST CLERK

NAPA CITY

VISUAL DISTANCE

Defendants' Exhibit 15
Official Map of Solano County
1909

SAN PABLO BAY

DEFENDANTS' EXHIBIT NO. 16

OFFICIAL MAP OF THE COUNTY OF SOLANO CALIFORNIA

SHOWING

MEXICAN GRANTS, U.S. SURVEYS, SWAMP LANDS, POLITICAL SUBDIVISIONS,
CITIES AND TOWNS, ROADS AND RAILROADS
POWER LINES AS IN 1925

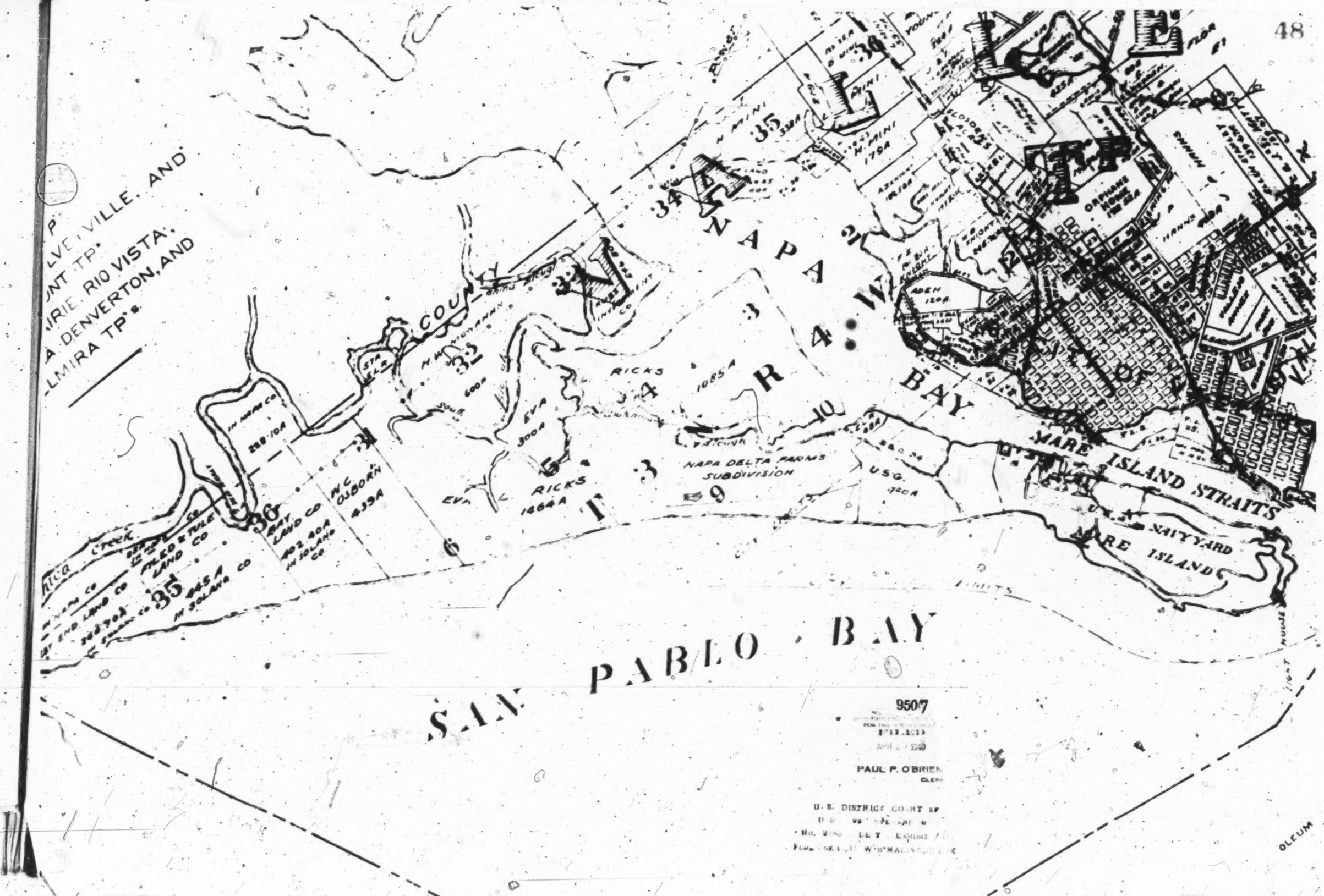
COMPILED BY **E.N. EAGER** EX-COUNTY SURVEYOR

APPROVED BY THE BOARD OF SUPERVISORS
MAY 4TH 1925

1st DIST. _____ CHAIRMAN
2nd J.R. THORNTON
3rd C.E. MAYFIELD
4th C.E. SCHMEISER
5th THOS. McCORMACK

ATTEST _____ CLERK

NAPA CITY

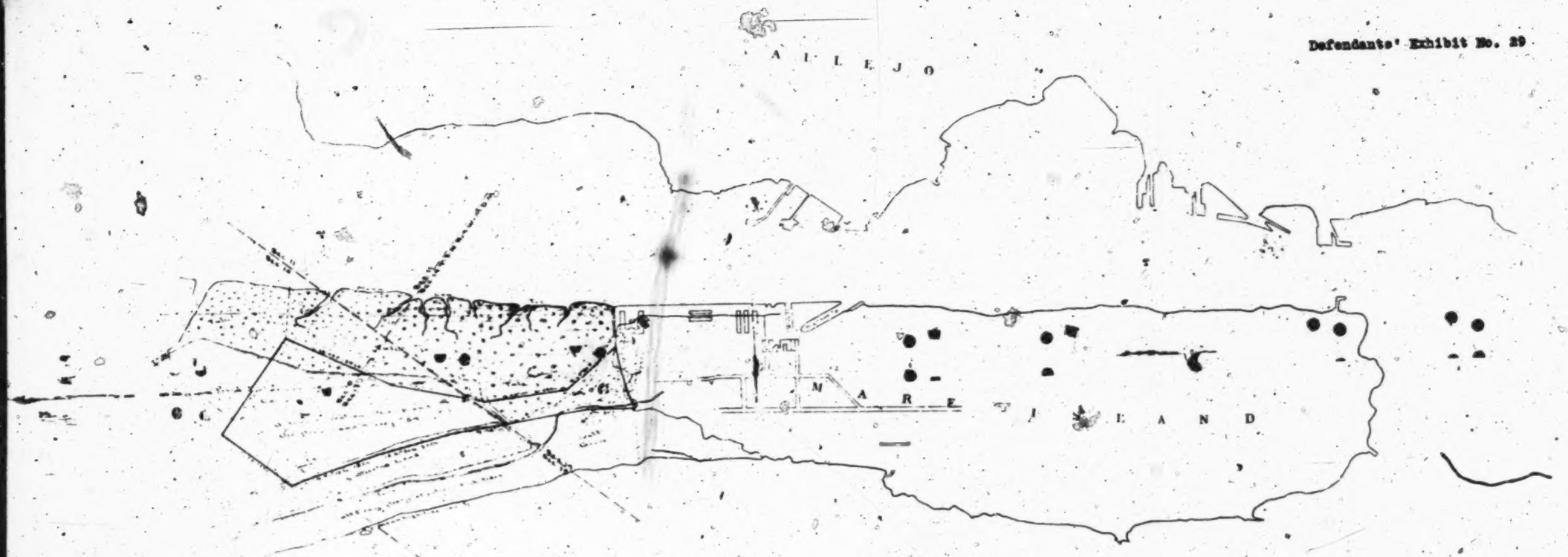


9507

PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COURT

Defendants' Exhibit No. 29



[illegible]		[illegible]		[illegible]	
White Lands		White Lands		White Lands	
[illegible] Land	110½	Cultivated Land	44	Uncultivated Land	4
Cultivated Land	9	Uncultivated Land	12	Without Levee	
With Levee		White Levee		Swamp Land (Tules)	104
Swamp Land (Tules)	0	Farm Land (valley soil)	78	Farm Land	2
Farm Land (valley soil)	20				
Total	129½	Total	132	Total	108

U.S. Navy Yard, Mare Island, Cal.
Map Showing Assumed Location
of Swamp & Overflowed Land Survey '51
and Observations
T. 3 N. R. 4 W. M.D.M.

Township No. 3 North, Range No. 5 West, Mount Diablo Meridian

SAN PABLO BAY

Meanders of San Pablo Bay

Beginning at M¹ on west and N°10' on mile 0 of Tp. thence

No.	Course	Distance
1	N. 88° E.	22.00
2	" 13 "	21.00
3	S. 60½ "	21.00
4	" 3 "	12.00
5	" 73 E.	20.00
6	" 85½ "	17.00
7	N. 13½ "	23.00
8	" 19½ "	14.00
9	" 68 "	14.00
10	" 58 "	26.00
11	" 74 "	14.00
12	" 66½ "	11.00
13	" 81½ "	33.00
14	" 17½ "	16.00
15	" 49½ "	32.00
M	" 33 "	25.00
17	" 27 "	13.78

Aggregate 324.78
Less Area 74.00

9507
No.
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED
APR 29 1940
PAUL P. O'BRIEN, CLERK

U. S. DISTRICT COURT
U S VS STEWART
No. 3686 DEPT. EXHIBIT 41
FILED JUNE 15,37 W. B. MALIVG, CLERK

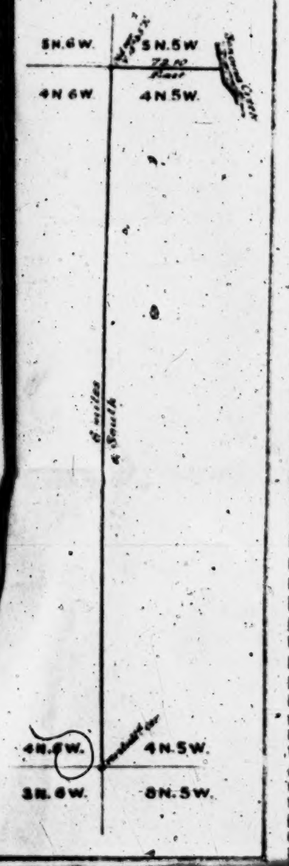
Aggregate Area of Private Grant		149.42 Acres
Swamp & Overflowed Land surveyed by Different Dep. Surv. in 1855		2452.64 "
Estimated Swamp & Overflowed Land in Sec 1		177.00 "
San Pablo Bay		20220.94 "
Aggregate		23000.00 "

Note. The Salt Marsh Land shown in Sec. 1, is copied from the published charts of the U.S. Coast Survey.

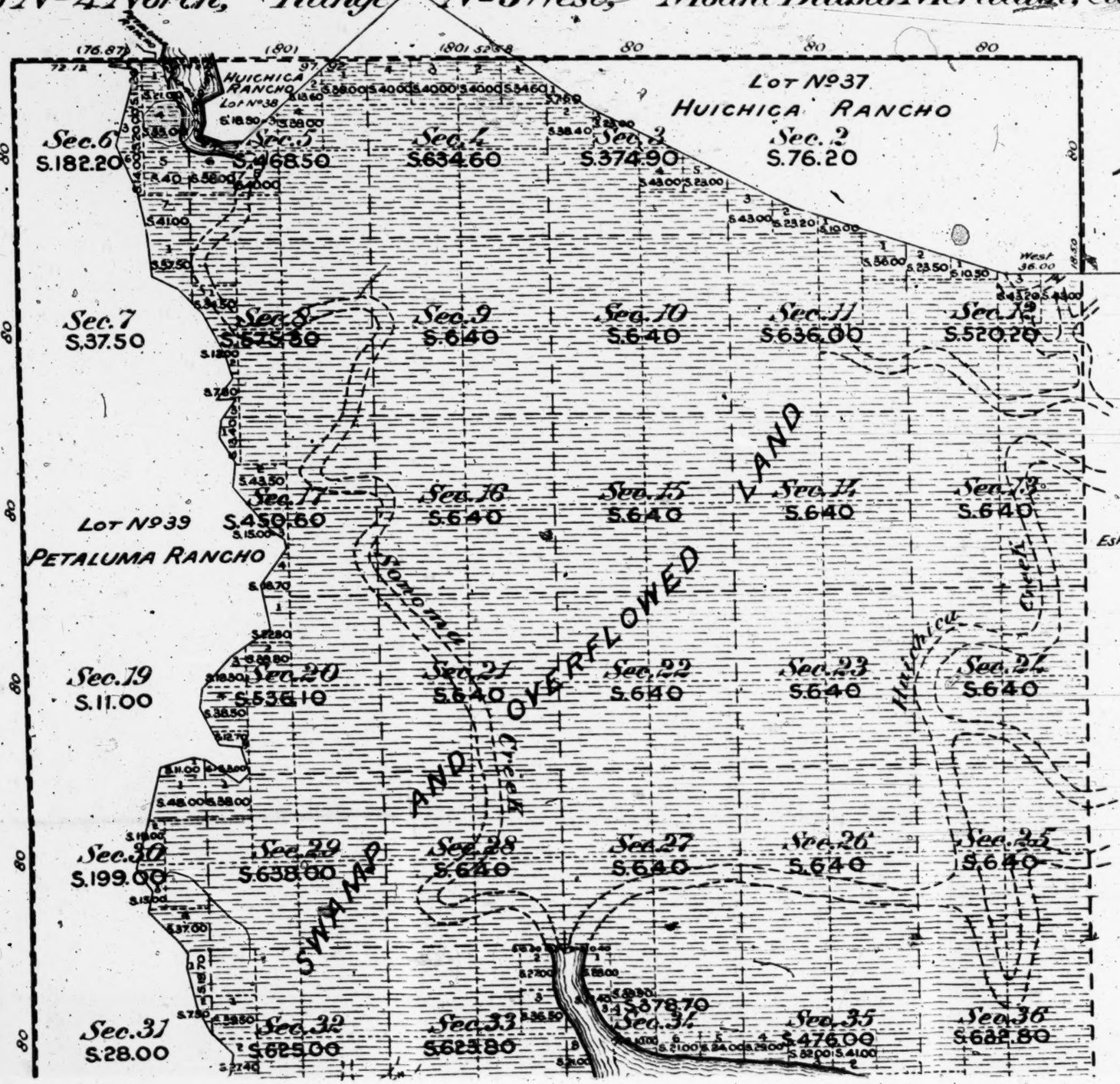
DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
Washington, D. C. July 10, 1907
I hereby certify that this is a true copy of the plat of official survey of the lands to which it relates, on file in this office.

Fred W. Gunett
Acting Commissioner.

Sketch showing resurveys by John Caldwell Dep. Surv., contract dated December 4th 1886 to establish the corrections in Tps 3 & 4 N. Rs 5 & 6 W., M. D. M.
Scale 80 chs. to 1 inch



Township No. 4 North, Range No. 5 West, Mount Diablo Meridian, California.



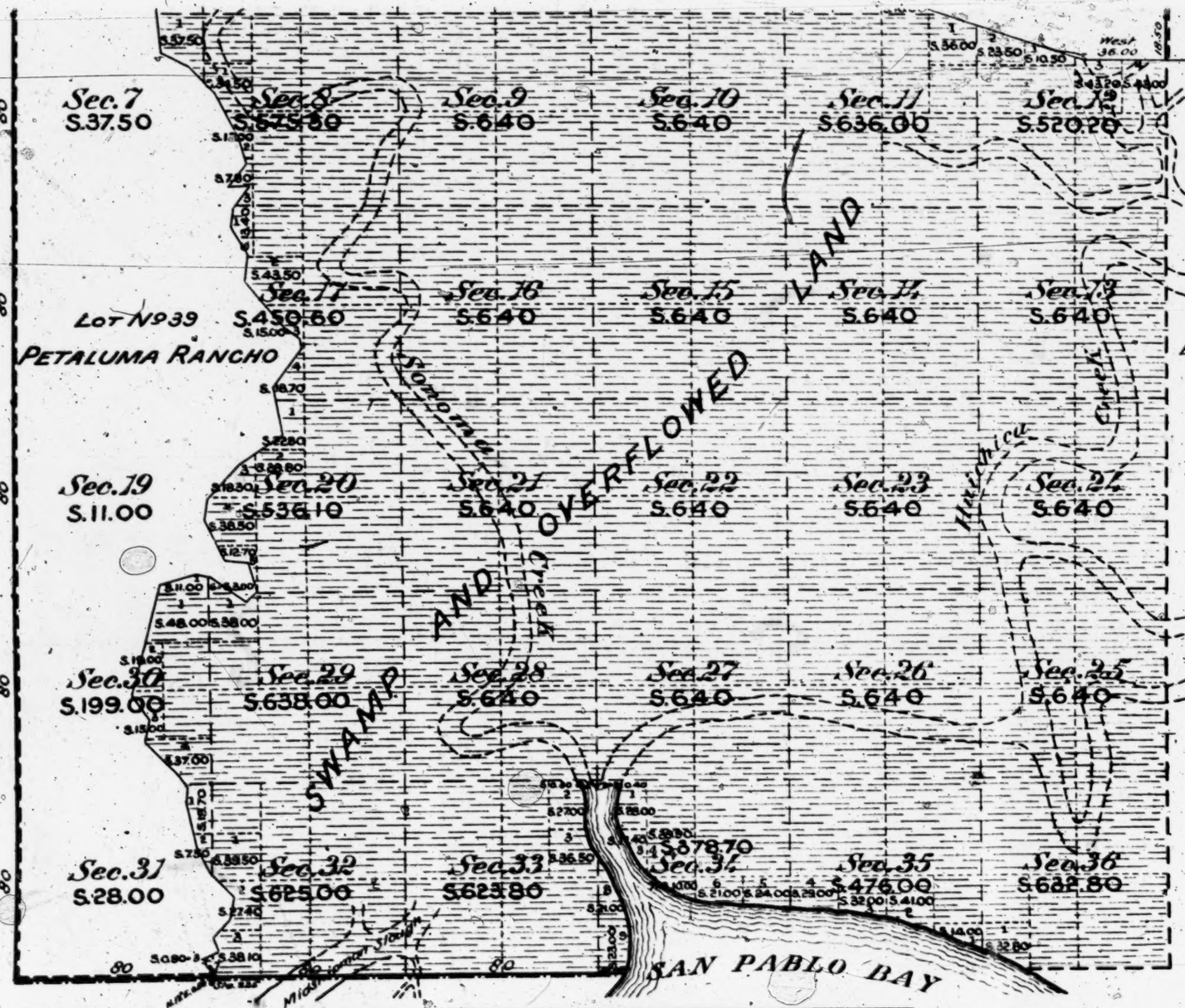
No. 9507
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 29 1940
PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COURT
U S vs STEWART
No. 2685 DEFT. EXHIBIT 42
FLD JUNE 10,37 W. B. MALING, CLERK

Estimated Area of Swamp and Overflowed Land	17,064.40 Acres.
" " Sonoma Creek in Secs. 5 and 6	62.00 "
" " Private Grants (Lots 37, 38, 39 and 40)	5,392.00 "
Aggregate	22,518.40 "

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C. July 30, 1907.
I hereby certify that this is a true copy of the plat of official survey of the lands to which it relates, on file in this office.

Fred Dennett
Acting Commissioner.



U. S. DISTRICT COURT
U S vs STEWART
No. 2885 DEPT. EXHIBIT 42
FLD JUNE 10,37 W. B. MALTBY, CLERK

Estimated Area of Swamp and Overflowed Land 17,064.40 Acres.
" " " Sonoma Creek in Secs. 5 and 6 62.00 "
" " " Private Grants (Lots 37, 38, 39 and 40) 5,392.00 "
Aggregate 22,518.40 "

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
Washington, D. C., July 30, 1907.
I hereby certify that this is a true copy of the plat of official survey of the lands to which it relates, on file in this office.

Fred Dennett
Acting Commissioner.

Surveys Designated	By whom Surveyed	Date of Contract	Amount of Survey	When Surveyed
Township Lines	F. R. Loring	April 6, 1852		1852
" "	John Gilcrest	Dec. 5, 1884		1885
Boundaries of Hutchiss Rch° (Lots 37 & 38)	C. C. Tracy	Instr. Dec. 1, 1858		1858
" " Petaluma Rch° (Lots 39 & 40)	"	" Oct. 1, 1859		1860

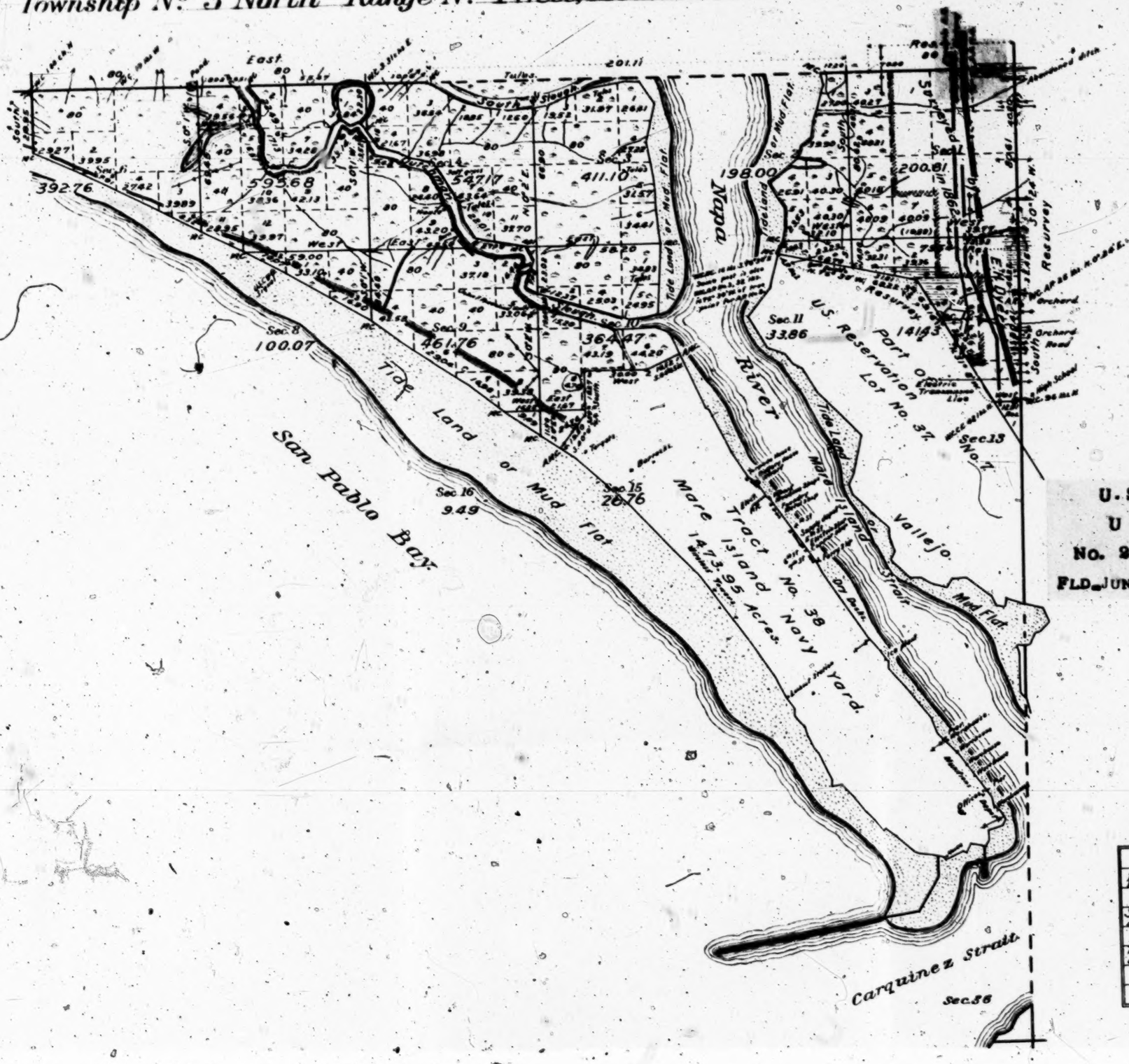
The above Map of Township N°4 North, Range N°5 West, Mount Diablo Meridian, California, has been compiled from the maps on file in this office of the survey of Mount Diablo Meridian and the State Segregation of Swamp and Overflowed Land in Sonoma and Napa Counties, in accordance with second clause of Section 2488 of the Revised Statutes of the United States, and also in accordance with directions contained in Department letter "E", dated February 2, 1904.

U. S. Surveyor-General's Office.
San Francisco, California.
March 9, 1907.

W. S. Graham
U. S. Surveyor-General for California.

Accepted November 8, 1923.

Frac. Township No. 3 North Range No. 4 West, Mount Diablo Meridian, California.



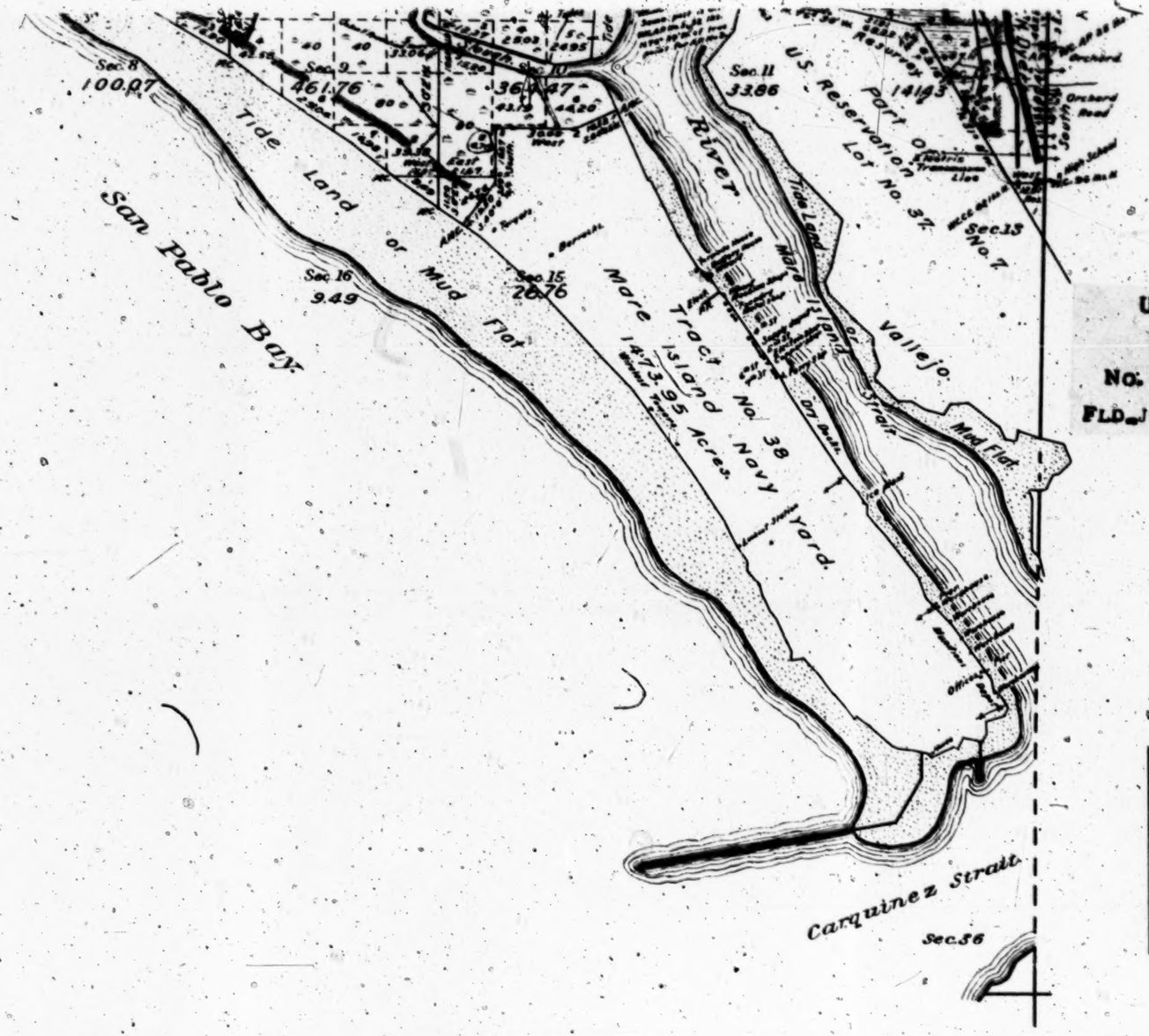
No. 9507
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 29 1940
PAUL P. O'BRIEN,
CLERK

U. S. DISTRICT COURT SF
U S vs STEWART ★
No. 2686 DEFT. EXHIBIT 43
FLD JUNE 15,37 W. B. MALIVG, CLERK

Areas in Acres.	
Public Land Previously surveyed	651.29
Swamp Land, surveyed under current instns.	348.36
Tract 38, surveyed under current instns.	1473.95
Total Area	5608.60

FOR THE NINTH CIRCUIT
FILED
APR 29 1940
PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COURT SF
U S. VS STEWART ☆
No. 9685 DEFT. EXHIBIT 43
FLD. JUNE 15,37 W. B. MALIVG, CLERK



Mean Magnetic Declination 18° 30' E.
Lat 38° 8' N. in SW¼ Sec. 4
Long 122° 16' W

For lines previously surveyed see plat approved March 4, 1863.

Surveys Designated	By Whom Surveyed	Group No	Group Date	Amount of Surveys Mls.	chs.	lks.	When Surveyed Begun	Completed
North bdy.	Francis E. Joy	96	Jan. 27 1921	See plat of T. 4 N., R. 4 W.			Aug. 3, 1921	Aug. 12, 1921
East "	U.S. Cadastral Engineer.		Sept. 27 1923	2	1	2	" 2, "	" 3, "
West "	"	"	"		29	95	June 26, 1922	June 26, 1922
Reservation bdy. res.	"	"	"	1	57	85	Sept. 1, 1921	Sept. 1, 1921
Subdivisions res	"	"	"		45	84	" 2 "	" 3 "
Subdivisions sur	"	"	"	9	30	87	" 2, "	June 26, 1922
Meanders	"	"	"	22	74	67	" 3, "	Oct. 10, 1923
Connections	"	"	"	1	20	99	" 2, "	Sept. 3, 1921
Tract bdy.	"	"	"	1	8	38	Oct. 10, 1923	Oct. 10, 1923

Org. O.B.T.

Frac.

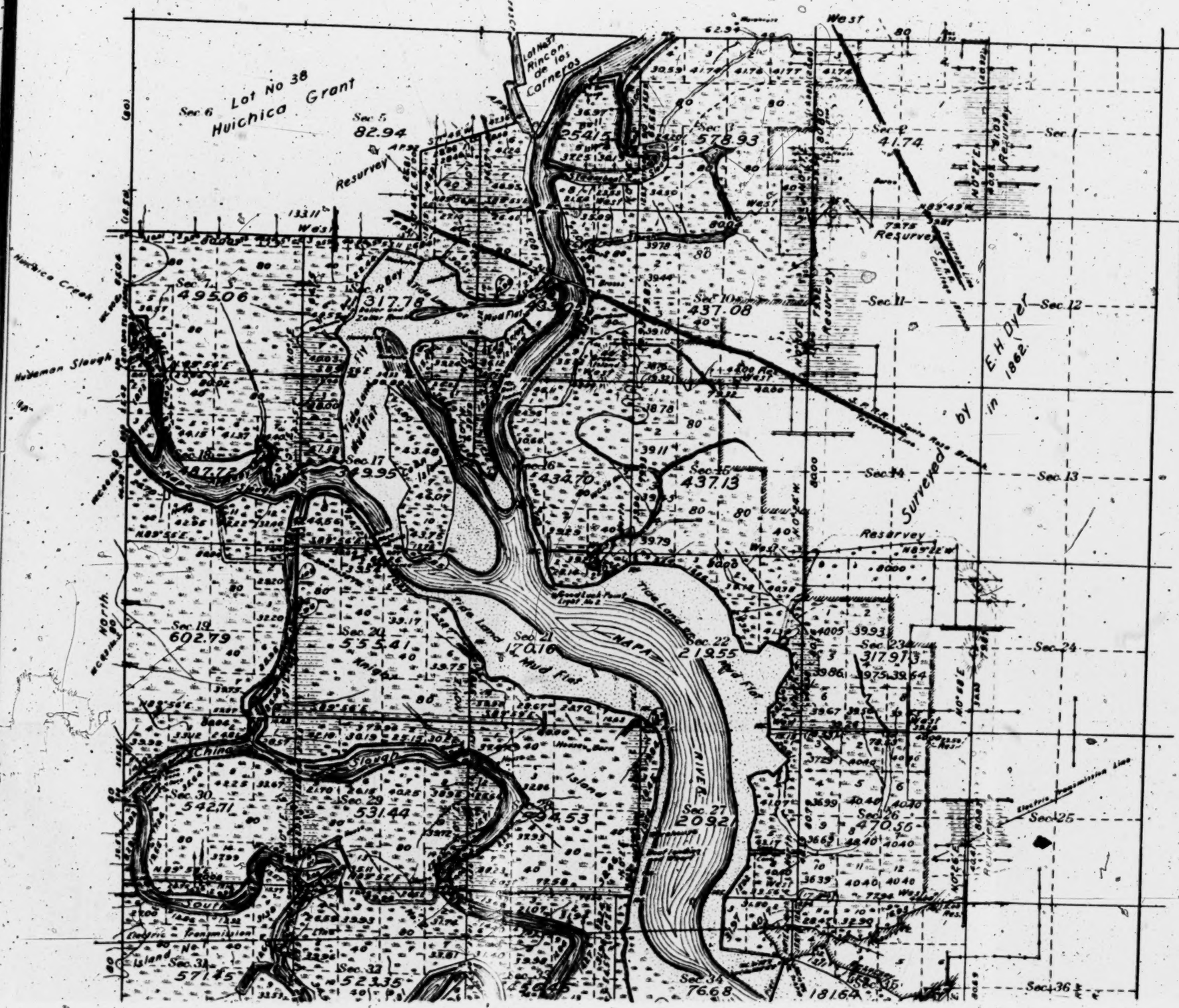
The above map of Township No. 3 North Range No. 4 West of the Mount Diablo Meridian California is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved.

U.S. Surveyor General's Office
San Francisco, California
October 24, 1923.

John Flores
U.S. Surveyor General
for California

Accepted November 8, 1923.

Frac. Township No. 4 North Range No. 4 West, Mount Diablo Meridian, California.



No. 9507
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 29 1940
PAUL P. O'BRIEN
CLERK

U. S. DISTRICT COVRT SF
U S vs STEWART ☆
No. 2685 DEPT. EXHIBIT 44
FLD. JUNE 15, 37 W. B. MALIVG, CLERK

Resurvey of Meanders

Sec. 35			
MC Secs 26 and 35 to AP1	S. 65° 16' W.	9.54	chs.
AP1 - 2	S. 69° 1' W.	6.53	"
- 2 - 3	S. 0° 29' E.	4.01	"
- 3 - 4	S. 71° 15' W.	6.53	"
- 4 - 5	N. 87° 25' W.	4.02	"
- 5 - 6	S. 44° 3' W.	5.02	"
- 6 - 7	S. 78° 43' W.	6.02	"
- 7 - 8	N. 62° 8' W.	5.01	"
- 8 - 9	S. 55° 4' W.	5.03	"
- 9 - 10	N. 54° 27' W.	4.02	"
- 10 - 11	S. 85° 38' W.	4.02	"
- 11 - 12	N. 52° 15' W.	4.51	"
- 12 - MC	N. 85° 21' W.	11.64	"
Sec. 34			
MC to AP1	N. 85° 21' W.	2.17	"
AP1 - 2	S. 68° 45' W.	4.81	"
- 2 - 3	N. 70° 23' W.	6.53	"
- 3 - 4	S. 20° 26' W.	1.51	"
- 4 - 5	S. 1° 35' W.	3.01	"
- 5 - 6	S. 32° 28' E.	1.99	"
- 6 - 7	S. 44° 3' E.	5.65	"
- 7 - 8	S. 18° 44' E.	4.00	"
- 8 - 9	S. 34° 15' E.	4.50	"
- 9 - 10	S. 89° 54' E.	2.49	"
- 10 - MC	N. 59° 10' E.	2.07	"
Sec. 35			
MC - AP1	N. 59° 10' E.	2.91	"
AP1 - 2	N. 79° 3' E.	6.47	"
- 2 - 3	N. 25° 14' E.	3.74	"
- 3 - 4	N. 72° 46' E.	3.98	"
- 4 - 5	S. 21° 31' E.	8.49	"
- 5 - 6	S. 56° 46' E.	4.48	"
- 6 - 7	S. 73° 51' E.	20.13	"
- 7 - 8	S. 8° 48' E.	3.51	"
- 8 - 9	S. 59° 48' E.	11.17	"
- 9 - 10	N. 77° 17' E.	8.17	"
- 10 - 11	S. 11° 30' E.	4.62	"
- 11 - 12	N. 45° 52' E.	7.97	"
- 12 - 13	N. 17° 4' E.	4.37	"
- 13 - 14	N. 69° 44' E.	8.71	"
- 14 - 15	S. 16° 25' W.	5.31	"
- 15 - 16	S. 69° 28' W.	4.53	"
- 16 - 17	S. 14° 13' W.	10.02	"
- 17 - 18	S. 61° 15' E.	4.98	"
- 18 - 19	S. 25° 46' E.	14.75	"
19 - MC			
Secs. 35 and 36	S. 51° 50' E.	3.28	

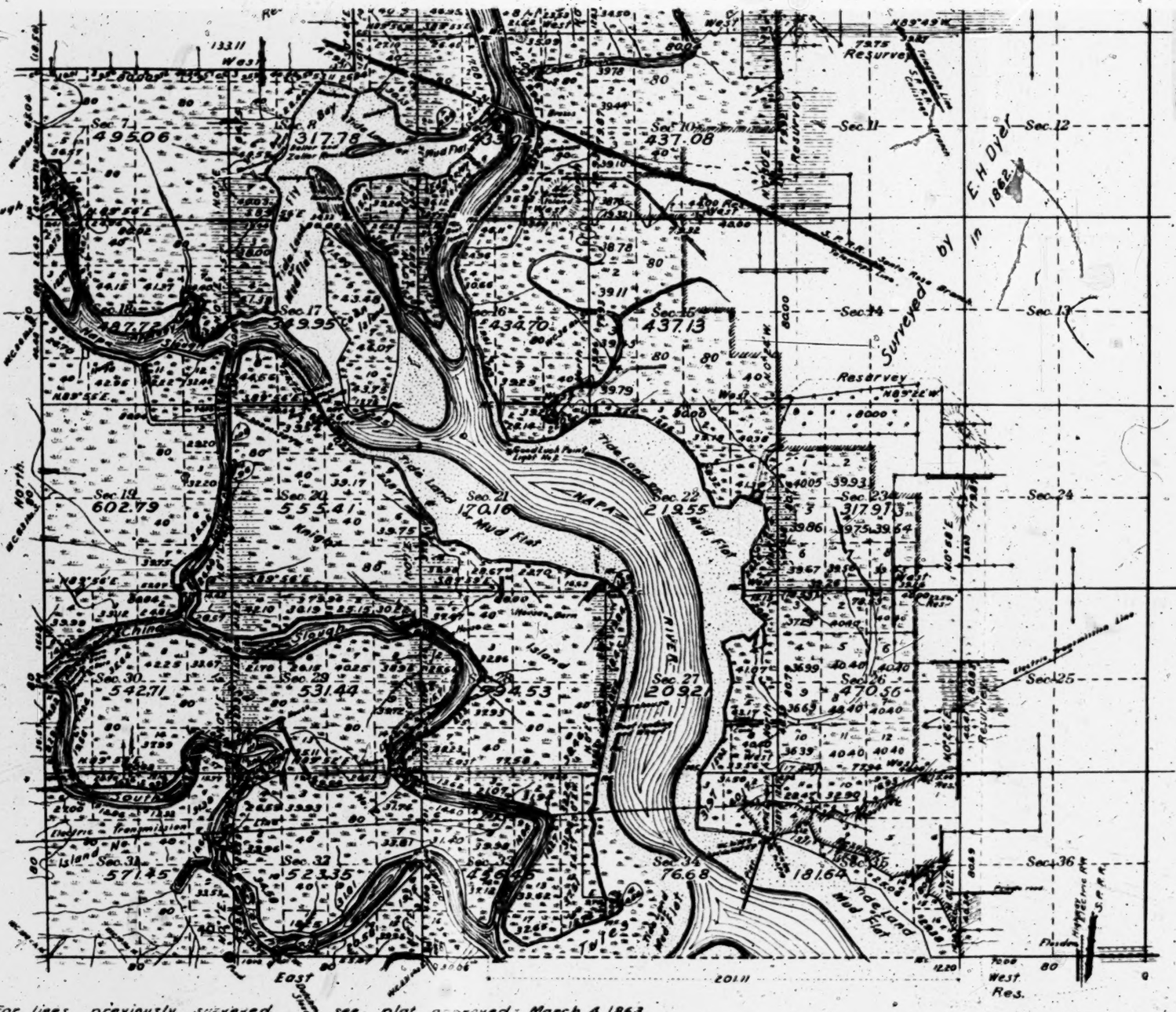
Areas

Resurveyed 1776.44 A.
New 10374.08

All areas shown upon this plat classed as surveys and overflowed lands, except SE¼ SE¼ Sec. 9

Areas in Acres	
Public Land Previously surveyed	6768.80
Estimated area, Tide Lands and Water Surface	4248.41
S&O Land, surveyed under current instns.	10334.08
SE¼ SE¼ Sec. 9 Public Land surveyed	

U S vs STEWART *
No. 9685 DEPT. EXHIBIT 44
FLD JUNE 15,37 W.B.MALING,CLERK



Resurvey of Meanders

Sec. 35					
MC Secs 26 and 35 to AP1		S 65° 16' W	3.56	chs.	
AP1	2	S 69° 1' W	6.33	"	
"	3	S 31° 25' E	4.80	"	
"	4	S 17° 12' W	6.53	"	
"	5	S 46° 3' W	5.02	"	
"	6	S 17° 42' W	6.02	"	
"	7	N 68° 8' W	3.01	"	
"	8	S 38° 8' W	4.02	"	
"	9	N 19° 27' W	4.02	"	
"	10	S 83° 38' W	4.02	"	
"	11	S 38° 15' W	4.51	"	
"	12	N 88° 21' W	11.64	"	
Sec. 34					
MC to AP1		N 87° 21' W	2.17	"	
AP1	2	S 66° 45' W	4.61	"	
"	3	N 70° 23' W	6.53	"	
"	4	S 39° 26' W	1.31	"	
"	5	S 11° 35' W	3.01	"	
"	6	S 32° 35' E	1.99	"	
"	7	S 44° 3' E	5.55	"	
"	8	S 18° 46' E	4.00	"	
"	9	S 36° 15' E	4.50	"	
"	10	S 69° 55' E	2.49	"	
10	MC	N 59° 10' E	2.07	"	
Sec. 35					
MC to AP1		N 5° 16' E	2.91	"	
AP1	2	N 7° 3' E	6.67	"	
"	3	N 25° 10' E	3.76	"	
"	4	N 7° 46' E	3.98	"	
"	5	S 21° 31' E	3.98	"	
"	6	S 2° 46' E	4.43	"	
"	7	S 73° 44' E	20.13	"	
"	8	S 18° 46' E	3.51	"	
"	9	S 52° 48' E	11.17	"	
"	10	N 77° 17' E	9.17	"	
"	11	N 11° 30' E	4.62	"	
"	12	N 48° 52' E	7.37	"	
"	13	N 67° 44' E	8.71	"	
"	14	S 16° 25' W	5.31	"	
"	15	S 69° 28' W	4.83	"	
"	16	S 14° 13' W	10.02	"	
"	17	S 61° 15' E	6.98	"	
"	18	S 25° 46' E	14.73	"	
19	MC	S 51° 50' E	3.28	"	

to Secs. 35 and 36

Areas

Resurveyed	1776.44 A.
New	10374.08 "

All areas shown upon this plat classed as surveys and overflowed lands, except SE¼ SE¼ Sec 9

Areas in Acres	
Public Land Previously surveyed	6768.80
Estimated area, Tide Lands and Water Surface	4248.41
S.P.R.R. Land, surveyed under current instns	10334.08
SE¼ SE¼ Sec. 9	
Public Land Surveyed under current instns	40.00
Total Area	21391.29

0 10 20 40 60 80 Tide Meanders

Scale 40 Chains to an inch

Mean Magnetic Declination 18° 30' E.
Lat 38° 12' N
Long 122° 16' W Near center of Sec. 14.

For lines previously surveyed, see plat approved March 4, 1863.

Surveys Designated	By Whom Surveyed	Group No.	Group Date	Amount of Surveys Mls.	Amount of Surveys chs.	Amount of Surveys lks.	When Surveyed Begun	When Surveyed Completed
N. bdy. new and res.	Francis E. Joy U.S. Cadastral Engineer	96	Jan 27, 1921		62	94	July 29 1921	Aug 22, 1921
W. "	"	"	"		65	04	Sept 6 "	Oct 30 "
S. " new and res.	"	"	"		42	26	Aug. 3 "	Sept 30 "
Subdivisions res.	"	"	"		71	82	" 3 "	Aug 22, "
" new	"	"	"		0	66	" 11 "	Oct. 30 "
Meanders res.	"	"	"		5	91	" 26 "	Aug 29 "
" new	"	"	"		56	48	" 18 "	Oct 27 "
Grant bdy. res	"	"	"		41	47	Sept 6 "	" 30, "
Connections	"	"	"		6	78	Oct 29 "	" 30 "

Orig. OBT.
Comp. FEB.

The above map of Fractional Township No. 4 North Range No. 4 West of the Mount Diablo Meridian California is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

U. S. Surveyor General's Office
San Francisco California
March 16, 1923.

John Flower
Surveyor General.
for California

Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

TRANSCRIPT OF RECORD

In Five Volumes

Supreme Court of the United States

October Term, 1941

No. 848

MARY W. STEWART, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

VOLUME V

(Pages 1 to 174)

Exhibits

and

Proceedings

in Circuit Court of Appeals

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9507

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Transcript of Record

In Five Volumes

Volume V

(Pages 1 to 174)

Exhibits

and

Proceedings

in Circuit Court of Appeals

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

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U. S. EXHIBIT D-1

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7522

James E. O'Donnell, et al.,

Appellants,

vs.

United States of America,

Appellee.

CERTIFIED COPY OF TRANSCRIPT IN CAUSE NO. 311, N. D. IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

Volume I.

TRANSCRIPT OF THE PROCEEDINGS

In Case

No. 307

G. W. P. BISSEL and
WILLIAM H. ASPINWALL,

Claimants,

vs.

THE UNITED STATES,

Defendant,

For the Place Named
"YSLA de YEGUA" or "MARE ISLAND"

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
In the State of California.

Be It Remembered, that on this thirty first day of August, Anno Domini One Thousand Eight Hundred and Fifty-two, before the Commissioners to ascertain and settle the Private Land Claims in the State of California, sitting as a Board in the City of San Francisco, in the State aforesaid, in the United States of America, the following Proceedings were had, to wit;

The Petition of G. W. P. Bissel & William H. Aspinwall, for the Place named "Ysla de Yegua" or "Mare Island", was presented, and ordered to be filed and docketed with No. 307 and is as follows, to wit;

(Vide page 3 of this Transcript.)

Upon which Petition the following subsequent Proceedings were had in their chronological order, to wit;

San Francisco, April 20, 1854.

In Case No. 307, G. W. P. Bissell et al: for the "Ysla de Yegua", the deposition of Stephen Cooper, a witness in behalf of the United States, taken before Commissioner Peter Lott, was filed;

(Vide page 5 of this Transcript.)

San Francisco, September 26, 1854.

Case No. 307 was ordered to be placed at the foot of the 2d class cases on the Trial Docket.

San Francisco, October 12, 1854.

In the same case the deposition of Juan B. Alvarado, a witness in behalf of the Claimants, taken before Commissioner Peter Lott, was filed;

(Vide page 9 of this Transcript.)

San Francisco, October 19, 1854.

In the same case the deposition of Mariano G. Vallejo, a witness in behalf of the Claimants, taken before Commissioner Alpheus Felch, was filed;

(Vide page 19 of this Transcript.)

San Francisco, Oct. 20, 1854.

In the same case the deposition of Juan José Castro, a witness in behalf of the Claimants, taken before Commissioner Peter Lott, was filed;

(Vide page 21 of this Transcript.)

San Francisco November 1, 1854.

In the same case the deposition of William McDaniel, a witness in behalf of the United States, taken before Commissioner R. Aug. Thompson, was filed;

(Vide page 25 of this Transcript.)

San Francisco, November 6, 1854.

In the same case the deposition of L. B. Meizner, a witness in behalf of the United States, taken before Commissioner S. B. Farwell, was filed;

(Vide page 27 of this Transcript.)

San Francisco, November 7, 1854.

Case No. 307 was submitted on briefs and taken under advisement by the Board.

San Francisco, May 8, 1855.

In the same case Commissioner S. B. Farwell delivered the opinion of the Board confirming the claim;

(Vide page 65 of this Transcript.)

and the following order was made towit:

(Vide page 69 of this Transcript.)

PETITION.

To the Honorable Commissioners to Settle Private Land Claims in California.

The petitioners George W. Bissell and William H. Aspinwall respectfully show.

That on the 31st day of October A. D. 1840 Manuel Jimeno Casarin Governor ad interim of California made a provisional grant to Victor Castro of the Island called "Isla de la Yegua" in the present County of Sonoma.

That on the 20th day of May A. D. 1841, Juan B. Alvarado Gov of California by virtue of authority of law in him vested granted to the said Victor Castro in fee the said tract of Land Mare Island a copy of which grants are herewith submitted marked "A". with a translation marked "B".

That on the 28th day of May A. D. 1850 the said Victor Castro sold and conveyed the said tract of land to said John B. Frisbee and Bezer Simmons of the firm of S. H. & Co. a copy of which conveyance is submitted herewith marked "C".

That on the 3d day of September A. D. 1850 the said Bezer Simmons and the said Simmons Hutch-

inson & Co. by Deeds of Assignment conveyed his interest in the said tract of land to F. Billings, I. R. Bolton and H. W. Halleck a copy of which Deeds of Assignment is submitted herewith marked "D".

That on the 15th day of August A. D. 1850 the said John B. Frisbee sold and conveyed a part of his interest in said tract of land to the petitioner William H. Aspinwall, a copy of the record of which conveyance is submitted herewith marked "E".

That on the 16th day of July A. D. 1852 the said John B. Frisbee sold and conveyed his remaining interest in said island to the petitioner G. W. P. Bessell a copy of which conveyance is submitted herewith marked "F".

That on the 1st day of July A. D. 1852 the said Billings, Bolton and Halleck sold and conveyed to the petitioner G. W. P. Bissell the interest of said Bezer Simmons and Simmons Hutchinson and Company in the aforesaid tract of land a copy of which conveyance is submitted herewith marked "G".

That on the 25th day of May A. D. 1850 the said Simmons and Frisbee sold and conveyed to Victor Castro one undivided tenth part of said island as shown by the original conveyance a copy of which conveyance is submitted herewith marked "H".

That on the 20th day of July A. D. 1852 the said Castro sold and conveyed the said one undivided tenth part of said island to the petitioner G. W.

P. Bissell a copy of which conveyance is submitted herewith marked "I".

And the petitioners further show that the said tract of land has not been surveyed by the Surveyor General of the United States such survey not being necessary, the land being an island and its boundaries easily defined; that moreover the petitioners and those under whom they hold have been for 12 years and now are in the quiet and undisputed possession and occupation of said island.

That they know of no conflicting claim. That they rely for confirmation of title upon the original papers, copies of which are submitted herewith upon the records and minutes in the archives now in charge of the Surveyor General and upon such other and further proofs as they may be advised are necessary.

Wherefore they pray the Commissioners to confirm to them the aforesaid tract of land.

By their Attys.

HALLECK, PEACHY &
BILLINGS

Filed in office Aug. 31, 1852.

(Signed) GEO. FISHER

Secy.

DEPOSITION OF S. COOPER

United States of America,
State of California.—ss.

San Francisco, April 20, 1854.

This day personally came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State Stephen Cooper a witness on behalf of the United States in Case No. 307 on the docket of said Board wherein G. W. Bissell and William H. Aspinwall are claimants. And the said witness being duly sworn on oath deposed in the English language as follows, to wit:

The Claimants Attorney is present.

1st Question.

What is your name, age and present residence?

Ans. My name is Stephen Cooper. My age is 57 years. My residence Solano County California.

2d Question.

Are you acquainted with Isla de la Yegua (Mare Island). If yea state where it is, how far you reside from it and how long you have known it?

Ans. I am acquainted with the island mentioned. It is situated in San Pablo Bay just below the Straits of Carquinas about 6 miles from Benicia. I was some 11 miles from it. I have known the island ever since the fall or early winter of 1847.

3d Question.

Look at the paper now shown you marked Exhibit No. 1 to the Deposition of Stephen Cooper, P. L. and say whether you have ever seen it before. If

yea, state where, when and under what circumstances?

Answer.

I believe I have seen the paper before. I would not sware to a bit of paper. I have seen a similar paper.

I do not remember the time precisely when I saw the paper, but it was some time in 1850, at Benicia. It was shown to me by Capt. Frisbee who claimed to have a title to the island from Victor Castro. Frisbee showed me the paper to proove his title to the island, because he understood I was backing some young men who were occupying the island against his wishes and I had told him if he had a good title he should have no trouble with the young men.

His object was to get the young men off and get the possession himself. Lancing B. Misner acted as interpretor for me when the paper was produced on that occasion. I called Capt. Frisbee's attention to the writing on the 2d page of the document and told him—

It is strange this writing appears here now, and it was not here in the winter of 1847 & 1848. He asked me if I thought that he forged it. I replied I did not, but I thought somebody had.

4th Question.

Did you ever get Mr. Misner to act as interpretor or translator of any document relating to Mare Island more than once?

Answer.

Never except the one time.

5th Question.

State why you informed Capt. Frisbee that the grant had been written on the paper after the year 1848?

Answer.

I am not able to say whether I judged from my having seen the paper and noticed the difference by ocular inspection or whether it was heresay which directed my attention to that point, and induced me to speak of him of it as I did. I had in the winter of 1847 and 1848 sent to Monteray to have the archives searched as Castro said he had a title then. I then thought of purchasing but I learned in some way that there was no sufficient title and gave up all idea of buying whether I saw the paper or not. I do not recollect.

I may have been informed of its character through Dr. Simple who went to Monteray for me or through others.

Claimants Counsel objects to the proofs respecting the archives as illegal.

Cross Examined by Claimants Counsel

1st Question.

What time in 1847 was it that you were negotiating or talking of a purchase of the island, and with whom?

Answer.

I cannot say nearer than that it was in the winter of 1847 or 1848. It was rainy weather. It was with

Victor Castro, Doct. Simple and myself. The Dr. had learned some Spanish and did the talking.

2d Question.

When you were having this conversation, were the papers exhibited to you?

Answer.

I do not think they were. Dr. Simple went to Castro house with him to see his papers.

3d Question.

When was the time then that you saw the papers which has been exhibited to you here?

Answer.

The time was in the spring of 1850 or about that time when Capt. Frisbee showed it to me as I before stated.

STEPHEN COOPER

Subscribed and sworn to before me on this 20th day of April A. D. 1854.

PETER LOTT

Commissioner for taking testimony &c.

Filed in office Aug. 20, 1854.

(Signed) GEO FISHER

Secy.

DEPOSITION OF JUAN B. ALVARADO.

United States of America,
State of California—ss.

San Francisco, Oct. 10, 1854.

This day came before Peter Lott, Commissioner taking testimony to be used before the Board of

U. S. Land Commissioners in said State, Juan B. Alvarado a witness on behalf of the claimants G. W. P. Bissell and William H. Aspinwall in Case No. 307 on the docket of said Board and said witness being sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows.

The U. S. Law Agent is present.

Questions by Capt. Halleck, Attorney for claimant.

1st Question:

What is your name, age and residence?

Answer:

My name is Juan B. Alvarado. My age 43 years, and residence, Contra Costa County, California.

2d Question:

Are you acquainted with the place called Mare Island. If yea, where is it?

Answer:

I am acquainted with it. It *it* is in the Bay of San Francisco near the Straits of Carquinas.

3d Question:

Did you ever as Governor of California make a grant of said Island to any one. If yea, to whom?

Answer:

I did as Governor, grant it to Victor Castro.

4th Question:

Look at the document, now shown to you, marked Exhibit 1 to deposition of S. Cooper. P. L. and also exhibited in this deposition and heretofore filed in this case and state if you know the handwriting and signatures to said document if yea. State your

means of knowledge and also whether they are genuine?

Answer:

I know the handwriting of Manuel Jimeno and Jose Z. Fernandez. I have seen them both write and their signatures as they here appear are genuine and this is also my own proper signature which I signed here at the time the paper was dated.

The body of said document on the first page is written by said Jose Z. Fernandez and the body of the second page is in my own hand writing.

5th Question:

State what you know of the occupation of said Island by said Victor Castro?

Answer:

In the year 1844 as I passed by the Island I saw horses on it belonging to said Castro and Castro and I took horses from the Island and crossed over and went to Sonoma. I understood and was well satisfied said Castro occupied said Island before he obtained said grant.

6th Question:

Is the place called by this name an Island surrounded by water?

Answer:

I think it is an Island.

Cross Examined by U. S. Law Agent.

1st Question:

Do you know where the Bay of San Pablo is?

Answer:

I think I do. It is a part of the Bay of San Francisco.

2d Question:

Is Mare Island in the Bay of San Pablo?

Answer:

No.

3d Question:

Are you acquainted with Mr. Frisbee's son-in-law, Genl. Vallejo?

Answer:

Yes. I am.

4th Question:

Have you ever had any conversation with him about this Mare Island?

Answer:

I do not remember ever to have had any conversation with him on this subject.

5th Question:

Have you a distinct recollection of having signed the document which has been exhibited to you in this case?

Answer:

I do not remember the act of signing it, though I know it is my signature and that I did sign it I have no doubt.

6th Question:

Where were you when you signed it?

Answer:

I ought to have been at the place where the paper is dated. I ought to be in Monterey.

7th Question:

Do you recollect positively where you were when you signed said document?

Answer:

I recollect what I have already answered.

8th Question:

Do you decline to give a direct answer about your recollection?

Answer:

I do not.

9th Question:

Then answer the question directly whether you remember where you were when you signed it?

Answer:

I would say independent of the document as a means of refreshing my memory that I was at Monterey.

10th Question:

In what house at Monterey were you?

Answer:

I do not remember.

11th Question:

Do you know independent of the wording of the instrument, that you signed it in Monterey?

Answer:

I do know that I did sign it in Monterey, independent of the wording of the document.

12th Question:

By what circumstances do you recollect it?

Answer:

Because I was Governor and I was at the head of the Department at the seat of Government at that time.

13th Question:

Who was Secretary at that time?

Answer:

I think Jimeno was.

14th Question:

Who petitioned for the grant in this case?

Answer:

I do not remember.

15th Question:

Was there any record of said grant kept in the archives?

Answer:

I do not remember.

16th Question:

Was it usual to keep a record of such grants?

Answer:

There was a book in which an entry was made of such grants generally though the Secretary might forget it.

17th Question:

How many grants did you ever make and write them out yourself?

Answer:

I cannot remember how many.

18th Question:

Did you ever write any besides this?

Answer:

I think I have.

19th Question:

What one?

Answer:

I cannot recollect now any particular one.

20th Question:

Why did you write this grant?

Answer:

I did it because I choose to do it and had the authority to do it.

21st Question:

In whose presence did you write?

Answer:

I do not remember.

22d Question:

Do you recollect having written it?

Answer:

I do not remember the act of writing it.

23d Question:

How long after you signed the Yerba Buena Island grant did you sign this grant?

Answer:

I do not remember.

24th Question:

How long before you signed it was it that you saw the horses on the Island?

Answer:

I never saw any horses there before I signed the title.

25th Question:

Why did not Jimeno sign this grant as Secretary?

Answer:

It might have happened that I did not order him to do it, or that he forgot it.

26th Question:

From whom did you receave this document when you wrote and signed the grant?

Answer:

I do not now remember from whom I receaved it.

27th Question:

How long was it in your possession before you wrote the grant in it?

Answer:

I do not recollect.

28th Question:

Had the paper been filed before you wrote the grant?

Answer:

I do not remember whether it had.

29th Question:

Had it ever been in the hands of the interested party before you wrote the grant on it?

Answer:

I do not recollect now, tho it is probable it had been.

30th Question:

Had you ever seen it before the time when you wrote the grant?

Answer:

I do not remember to have seen it before that occasion.

31st Question:

Had you ever heard of it before?

Answer:

Yes I had. I believe that Jimeno told me at Monteray about the time I made the grant that he had given the provisional grant to the Land.

32d Question:

Was it before or after you made the grant?

Answer:

I believe he told me before.

33d Question:

How long before?

Answer:

I do not remember.

34th Question:

Where were you when he told it to you?

Answer:

I think I was in Monterey. I cannot remember the exact house or spot.

35th Question:

What led to the conversation?

Answer:

I do not remember.

36th Question:

What did he tell you?

Answer:

I do not remember.

37th Question:

Had you ever been at Mare Island before you made the grant?

Answer:

I had not.

38th Question:

When did you first know it by that name?

Answer:

I have heard it called by that name for a long time. I do not know how long, but I heard it before I made the grant.

39th Question:

From whom did you hear it?

Answer:

I cannot remember any particular person. It was publicly called and known by that name. I recollect Jimeno told me of the grant by him and spoke of it by that name.

40th Question:

What did you know of said Island before you made the grant?

Answer:

I had never seen it or had any personal knowledge of it before that. I had heard that Victor Castro either had put on or was about putting horses on the said Island and occupying it.

41st Question:

Had you heard anything else about it?

Answer:

I do not remember to have heard anything else.

42d Question:

How many grants did you make of land while you were Governor where you had no knowledge either by report or otherwise of the land?

Answer:

I do not remember.

43d Question:

Did you ever make any without such knowledge?

Answer:

Yes. Various ones.

44th Question:

Name some of them.

Answer:

I do not remember any besides the grant in question.

45th Question:

Was it not your constant practice when you were ignorent of the land applied for to refer it to some local authority for report or information before you made the grant?

Answer:

It was not: I required such information in some cases, and not in others as it suited my views at the time.

46th Question:

Without information on the subject how could you tell what to grant?

Answer:

I knew or understood in some manner sufficient to decide upon the business of my Government at that time.

47th Question:

In what manner did you know enough in this case for the purpose of granting the Island in question?

Answer:

I got information from Jimeno of the business before I made the grant. I do not now remember what he told me.

48th Question:

How did you know Castro wanted the grant?

Answer:

Probably Jimeno told me so.

49th Question:

State all that Jimeno had to do with making the grant or giving information in the case?

Answer:

I cannot now recollect the particulars of this matter, but it is most likely that Jimeno had some proceedings in the business and informed me of it, and that I therefore went on and made the grant out. I cannot be posative as to the exactness of what did transpire.

50th Question:

Why did you not as was your usual custom first make a decree annexed to the Expedient and then make the grant on a separate piece of paper?

Answer:

Because I was sufficiently well satisfied with what I did.

JUAN B. ALVARADO.

Subscribed and sworn to before me on this 10th day of October A. D. 1854.

PETER LOTT,
Commissioner.

Filed in office Oct. 12, 1854.
(Signed) GEO. FISHER,
Secy.

DEPOSITION OF M. G. VALLEJO.

United States Land Commission.

San Francisco, Oct. 19, 1854.

On this day before Commissioner Alpheus Felch came Mariano G. Vallejo a witness on behalf of the claimants G. W. P. Bissell et al. Case No. 307 who after being duly sworn deposed as follows:

Questions by Capt. Halleck attorney for claimants.

1st Question:

Please state your name, age, and place of residence?

Answer:

My name is Mariano G. Vallejo. My age 47 years and I reside at Sonoma in California.

2d Question:

Do you know the place called Mare Island. If yea, where is it situated?

Answer:

I do know it. It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two and ~~a half~~ miles in length. It is irregular in its

width and contains about a half a league of land, a little more or less.

3d Question:

State what you know of the occupation of the Island?

Answer:

I was occupied by Victor Castro a long time ago by putting his horses on it. He commenced putting them there in 1839 or 1840 according to my best recollection and continued to keep them there until 1850. He had a little correl there. The horses were seventy or eighty in number.

4th Question:

Did you ever see the title papers of said Island. If yea, when?

Answer:

I saw them some twelve years ago.

5th Question:

Please look on the paper now here presented to you being marked "Exhibit 1 to Depo. of S. Cooper P. L." heretofore filed in this case and also marked as filed on the tenth day of Sept. 1853 and state whether this is the title paper alluded to in the last question and answer?

Answer:

It is the same.

M. G. VALLEJO.

Mr. McKum, Law Agent, attended at the taking of this deposition but propounded no questions to the witness.

Subscribed and sworn to before me this 19th day of October, A. D. 1854.

ALPHEUS FELCH,
Commissioner.

Filed in office Oct. 19th, 1854.

(Signed) Geo. Fisher, Secy.

DEPOSITION OF JUAN JOSE CASTRO.

United States of America,
State of California.—ss.

San Franeisco Oct. 19, 1854.

This day came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan Jose Castro a witness on behalf of the claimants G. W. P. Bissell, and William H. Aspinwall in case No. 307 on the docket of said Board, and said witness being duly sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows:

The U. S. Law Agent is present.

Questions by Judge Sutherland for Claimants.

1st Question.

What is your name, age & place of residence?

Answer.

My name is Juan Jose Castro. My age 52 years. My residence Contra Costa County, California.

2d Question.

Do you know the place called Mare Island. If yea, state what you know of its occupation?

Answer.

I do know the said Island. Victor Castro occupied it in the year 1840 by putting mares and horses on it, and he built a hut there for the Indians in charge of said stock and a corral for the stock. I assisted in putting said mares and horses on the Island.

Cross Examined by U. S. Law Agent.

1st Question.

How many Islands did Gov. Alvarado ever grant to you?

Answer.

Only one, the Island of Yerba Buena.

2d Question.

Are you a brother to Victor Castro the grantee in this case?

Answer.

I am.

3d Question.

How many mares and horses were put on the Island at the time you have mentioned?

Answer.

About 50 head.

4th Question.

Was that before or after the grant was made?

Answer.

It was after the grant in the same year.

5th Question.

Where did you take animals from?

Answer.

From San Pablo.

6th Question.

Which Island was granted first Yerba Buena or Mare Island?

Answer.

The Island of Yerba Buena was first granted.

7th Question.

How do you know?

Answer.

Because it was granted to me.

8th Question.

Were both grants made at the same place?

Answer.

I came here to give testimony concerning Mare Island and when that is done you can ask concerning the other.

9th Question.

How did you take the mares from San Pablo to Mare Island and who was with you?

Answer.

We drove them to the Straits and then took them over in boats to the Island. There were some Mexican and Indian servants with me. 3 Mexicans and 4 or 5 Indians.

The Mexicans were Manuel Andres, Mariano and Olvera, and I do not know the names of the Indians. Victor Castro was along with us.

10th Question.

How long were you taking the mares to the Island?

Answer.

We were 3 or 4 hours going from San Pablo to the Straits, and we were 2 days putting them on the Island.

11th Question.

How long did you all ~~stay on the~~ Island after you got the stock all over?

Answer.

Victor and myself went away after it was all done and we left the Indians there to take care of the stock.

12th Question.

What time in 1840 was this done.

Answer.

I do not remember what month it was, though I think it was in October or November. The rainy season had commenced.

13th Question.

When were you next at the Island and how long?

Answer.

I was there in the following year in June. We were there but a short time. We just went there to get some horses to ride.

14th Question.

Who went with you?

Answer.

Victor Castro the grantee in this case.

15th Question.

When were you next there?

Answer.

I have not been there since.

16th Question.

To what place did you ride the horses you took from the Island in 1841 and how long did you stay?

Answer.

We went to Sascal to land the horses there. We were there 3 or 4 days.

17th Question.

Where did you go then?

Answer.

We went and left the horses on the Island, and then we went to San Pablo.

18th Question.

On what part of the Island was the corral built?

Answer.

It was on the left hand side of the Island as you enter the Straits going to Napa.

19th Question.

How many tame horses were there among those on the Island?

Answer.

Some 10 or 12.

Re-examined by Claimants Counsel

1st Question.

When you say that the horses were placed on the Island after the grant, state what grant you mean?

Answer.

I mean the first provisional concession by Jimeno.

Juan Jose Castro.

Subscribed and sworn to before me on this 19th day of October A. D. 1854.

Peter Lott Comr. & C.

Filed in office Oct. 20th, 1854.

(Signed) Geo. Fisher, Secy.

DEPOSITION OF WILLIAM McDANIEL.

United States Land Commission

San Francisco, Nov. 1, 1854.

On this day before Commissioner R. Aug. Thompson came William McDaniel a witness on behalf of the United States in Case No. 307 in which case G. W. P. Bissell et al, are claimants who after being duly sworn deposed as follows:

Present U. S. Law Agent & Mr. Halleck for claimants.

Witness states that his name is William McDaniel, his age fifty four years and residence Solano County California.

Question by Law Agent.

Are you acquainted with the place called Mare Island. If yea, state what you know in relation to the grant of said Island and of the document filed in this case as evidence of title marked Exhibit 1 to Depo. of S. Cooper P. L.

Answer.

I can only state that in the spring of 1850 Stephen Cooper showed me a paper purporting to be a permit to one Castro to pasture mares and colts on the

Island. Said document was I think in the Spanish language and was translated to me by Mr. Misner, or it might have been a written translation of the document.

Mr. Cooper presented said paper to me in order to obtain my opinion as to whether it was suffieient to prevent his taking a preemption on said Island.

In reply I informed him that I did not think it offered any obsticle to such preemption.

Some time afterwards in the spring or early in the summer said Cooper informed me that Mr. Frisbee had brought the same paper back with a grant upon the back of it and prohibited him from selling in or occupying said Island.

I did not see the paper at that time. Nor am I able to state that the document referred to in the question is the same paper.

(The latter clause of this answer objected to by claimants Atty. on the ground that it is hearsay)

WILLIAM McDANIEL

Subscribed and sworn to before me Nov. 1st, 1854.

R. AUG THOMPSON,
Comr.

Filed in office Nov. 1st, 1854.

(Signed) GEO. FISHER,
Secy.

DEPOSITION OF L. B. MIZNER

San Francisco Nov. 4th 1854.

On this day before Commissioner S. B. Farwell personally came L. B. Mizner a witness on behalf of the Government in case No. 307 and after being duly sworn deposed as follows:

1st Question.

What is your name, age and place of residence?

Answer.

My name is L. B. Mizner, age twenty seven years, residence Benicia.

2d Question.

Are you acquainted with the original grant from Gov. Jimeno and Juan B. Alvarado to Victor Castro marked Exhibit 1 attached to the deposition of S. Cooper—if yea state all you know in regard thereto?

Answer.

I saw the paper in the year 1850 and interpreted the same to Major Stephen Cooper. So much as is on the first page which purports a permit to pasture horses on the Island. As to what is contained on the back I had no recollection whether it was there or not which purports to be a grant from Gov. Alvarado.

3d Question.

What is your impression as to the second grant being on the paper at the time you examined the same?

Answer.

My impressions are that the second grant was not

on the paper at the time I examined the paper, but don't know whether I got the impressions from the inspection of the paper at the time or from what has since been said to me in reference to the matter by Dr. Simple and Major Cooper. Dr. Simple is now dead.

Questions by Claimants Counsel.

1st Question.

What time in the year 1850 was it that you saw the paper?

Answer.

I am not able to state, don't know that I could say within twelve months of the time.

2d Question.

What means have you of knowing this to be the same paper that was shown you at the time?

Answer.

Nothing only from my recollection of its appearance and contents. I do not know the handwriting in which it is written.

L. B. MIZNER

Sworn to and subscribed before me on 4th Nov. A. D. 1854.

S. B. FARWELL,
Comr.

Filed in office Nov. 4th, 1854.

GEO FISHER, Secy.

Sello tercero Dos Reales. 11

Habilitado provicionalmente por la Aduana Marítima del puerto de Monterey, en el Departamento de las Californias, para los años de mil ochocientos cuarenta y mil ochocientos cuarenta y uno.

Alvarado. Antonio María Osio.

San Juan de Castro Sr. Prefecto del 1er distrito.

Nº 30 de 1840. José Victor Castro natural y vecino de este departamento ante la notoria Justificacion de V.S. como mas haya lugar y en dro. me presente hago presente: que siendo notorio los perjuicios que acuerda pasó general mente recibimos por los Indios de Arras &. y no encontrando yo parte segura para poner estos bienes, me veo en la necesidad de ocurrir á la bondad de V.S. a fin de que encontrandose en la Bahia de Sn Fran.co una Isla adyacente, llamada de la Nebua sin que se conozca dueño alguno, pido se me conceda por depositar mis espresados bienes, donde los considero exentos de los perjuicios que puedan sobrevenir por los dichos Indios. Sor. yo le cedai que hacer algunos gastos por razon de pasar á dicha Isla mis costos intereses, pero todo lo haré con gusto con tal de asegurar lo que me resta.

Por tanto A V.S. pido y suplico se sirva decretar a favor del que represento, y mandando no ser de malicia y lo necesario &.

Monterey 8bre 30. de 1840.

José Victor Castro.

Exmo. Sor. Gobernador.

Vista la el contenido en esta instancia y el informe del Juez de Paz de la Contra Costa y todo lo demas que

Copia de Expediente

que se tuvo presente, informe la Prefectura que el interesado obtiene los requeritos legales para ser atendido y que la Ysla que solicita llamada la Llegua se halla baldia y sin pretension de alguna persona dejando lo al parecer de S. E.

San Juan Bta 14 de Noviembre de 1840.
José J. Castro.

3 Sello 2º reales Dos reales.

Habilitado provicionalmente por la Aduana Maritima del puerto de Monterey en el Departamto de las Californias, para los años de mil ochocientos cuarenta y mil ochocientos cuarenta y uno.

Alvarado. Antonio Maria Osio.

(Seal) En virtud del Superior decreto que antecede del Sor. Prefecto Dn José Castro que obtuvo a bien mantenerme de la solicitud que se ase de la Ysla nombrada de la yegua de ber de ser que dha Ysla, es mas pertenesiente a la costa de Sn Solano que a la de Sn Pablo y que asta la fecha se halla baldia, y ignorando esta a la autoridad el que haya ganado, pretendido por ninguno C. en cuanto debo decir en cumplimiento de lo que se me pide.

Dios y libertad. Rancho de Sn Antonio
6 de Abr. de 1840. Ygo Peralta

Office of the Surveyor General of the United States for California.

John C. Hays, Surveyor General of the United States for the State of California and as such now having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican Territory or Department of Upper California, by virtue of the power vested in me by law, do hereby certify that the three preceding and hereunto annexed pages of tracing paper numbered from one to three inclusive exhibit a true and accurate copy of a document now on file and forming a part of the said archives in this office.

In testimony whereof, I have hereunto signed my name officially and caused my seal of office to be affixed at the City of San Francisco this twenty ninth day of September, 1853.

JOHN C. HAYS
U. S. Surveyor Gl. California.

Filed in office Jany. 19, 1854.

GEO. FISHER,
Secy.

TRANSLATION OF EXPEDIENT.

Stamp Third. Two Reales.

Provisionally authorized by the Maritime Custom House of the Port of Monterey in the Department of the Californias for the years 1840 and 1841 Alvarado.

ANTONIO MARIA OSIO.
Senor Prefect of the 1st District.

(Custom House Stamp)

Jose Victor Castro a native of and resident in this Department before the known justification of Your Excellency as is proper and lawful presents himself and represents.

That it being well known that we generally every year receive injuries from the Indians by robberies, etc. and as I have no secure place to put my little stock, I am under the necessity of coming to the goodness of Your Excellency and as there is an adjacent Island in the Bay of San Francisco called "Mare Island" which has no owner, of asking that it may be granted to me for depositing my said stock where it will be safe from the injuries which happen from said Indians.

I know Senor that it will make me some expence to pass over to said Island my small property but I will do it and with pleasure in order to secure what little remains to me.

Wherefore I beg and pray that you will be so good as to decree in favor of the Petitioner [illegible] etc.

Monterey, October 30th, 1840.

JOSE VICTOR CASTRO.

(In the Margin)

San Juan de Castro,
October 30, 1840.

Pass this Petition to the Justice of the Peace of the Contra Costa for report of the said adjacent Island which Citizen Victor Castro asks for is vacant and if it can be granted and this being done return it for decision.

CASTRO.

In virtue of the Superior decreto which precedes of Senor Prefect Don Jose Castro which you have been so good as to send to me on the petition for the Island called "de la Yegua" I ought to say that said Island belongs rather to the Coast of San Solano than to that of San Pablo, and that to the present time it is vacant and this authority does not know as any citizen has ever pretended to it, this is what I ought to say in compliance with what is asked of me.

God and Liberty. Rancho of San Antonio, November 4th, 1840.

GRACIA PERALTA.

Most Excellent Senor Governor:

Having seen the contents of this petition and the Report of the Justice of the Peace of Contra Costa and all else presented the Prefecture reports that the petitioner possesses the legal requisits to entitle him to be attended to and that the Island asked for call "La Yegua", (Mare Island) is vacant and without any person pretending to it, leaving the matter to your Excellency's pleasure.

San Juan Bautista, Nov. 14th, 1840.

JOSE F. CASTRO.

Filed in office Jan 19, 1854.

(Signed) GEO. FISHER,
Secy.

Manuel Jimeno Casarin Gobernador Interino del Departamento de las Californias.

(Seal) Se le permite provisionalmente mientras se practican las diligencias de estilo á D. Victor Castro ocupe con caballada la Isla nombrada la Yegua en el estrecho de los Carquines, sujetandose al resultado que produzca las citadas diligencias.

En consecuencia entreguese este permiso al interesado para su resguardo.

Monterey. 31 de Oct.e de 1840.

Jimeno. José L. Fernandez Sr. Ynst.

Exhibit no. 1. Dep. of S. Cooper. J.L.

Exhibit in Dep. of Juan B. Alvarado. Feb. 11th 1854

Juan B. Alvarado, Gob.r Constitucional, Propietario del Departamento de Californias.

Por cuanto D.n Victor Castro Mejicano por nacimiento ha pretendido a este Gobierno la propiedad de la Isla nombrada la Yegua situada á las inmediaciones del Estrecho de Carquines en cuya consecuencia se le concedio la licencia que antecede del Sr. D.n Manuel Jimeno Casarin encargado interinamente de este Gobierno y en virtud de que el solicitante ha repetido nuevamente sus instancias probando que la dicha Isla no pertenece á la propiedad de algun individuo, pueblo ni corporacion he venido en decreto de este dia en declarar como declaro por el presente á D.n Victor Castro dueño en propiedad de la referida Isla en toda su estension conforme á las facultades que me son conferidas por el Supremo Gobno Nacional.

En consecuencia entreguese este al interesado para que le sirva de titulo y para su resguardo y demas fines que le convengan. Dado en Monterrey Capital del Departamento á los 24 dias del mes de Mayo de 1841.

Juan B. Alvarado

Filed in Office. Sep 10. 1853.

Geo. Fisher Secy.

TRANSLATION OF TITLE.

Manuel Jimeno Casarin, Governor ad interim of the Department of the Californias:

[(Seal) Civil Govt. of Upper California.]

Don Victor Castro is provisionally permitted while the usual steps are being *to* taken, to occupy with horses the Island named "La Yegu" in the Straits of Carquenez.

In consequence let this permission be delivered to the party interested for his security.

Monterey, Oct. 31, 1840.

(Signed) JIMENO.

(Signed) JOSE Z. FERNANDEZ,
Sec. ad interim

Juan B. Alvarado, regular Constitutional Governor of the Department of the Californias:

Whereas, Don Victor Castro, a Mexican by birth, has petitioned to this Government for the ownership of the Island named "La Yegu" situated in the neighborhood of the Straits of Carquinez in consequence of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being, in charge of this Government, and in virtue of which the petitioner has repeated again his petition, proving that said Island does not belong to the ownership of any individual, corporation, Pueblo, I have in decree of this day declared as I do by these presents declare Don Victor Castro owner in fee of the said Island in all its extent con-

formably with the powers conferred on me by the Supreme National Government. In consequence let this be delivered to the party interested, that it may serve him for a title, and for such other purposes as may be convenient.

Given in Monterey Capital of the Department on the second day of the month of May.

(Signed) JUAN B. ALVARADO

Filed in office Aug. 31st, 1852.

GEO. FISHER,
Secy.

Recorded in Ev. B Vol. 17, p. 606.

GEO. FISHER,
Secy.

DEED FROM CASTRO TO B. SIMMONS & J. B. FRISBEE.

Know all men by these Presents.

That I Victor Castro and Loiza Martinez his wife of Contra Costa in the State of California, for and in consideration of seven thousand five hundred dollars to us paid by John B. Frisbee of Benicia and Bezer Simmons of San Francisco in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said John B. Frisbee and Bezer Simmons their heirs and assigns all that tract of land lying and being in said California and described as follows viz. Being that

tract of land situated near the Straits of Carquinez in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it to the Northward, the said tract of land being known as "Isla de la Yegua" or Mare Island being the same land granted to me the said Castro on the twentieth day of May A. D. 1841 by Juan B. Alvarado Governor of California, the original grant being referred to made a part of this deed and herewith transferred to the said Frisbee and Simmons.

To Have and to Hold the said described and conveyed premises with all the appertiances unto the said John B. Frisbee and the said Bezer Simmons their heirs and assigns to them and their own use & behoof forever.

And I the said Victor Castro for myself, my heirs executors and administrators covenant hereby to and with the said John B. Frisbee and the said Bezer Simmons their heirs executors administrators & assigns that I am lawfully seized in fee of the afore granted premises, that they are free from all encumbrances, that I have good right to sell and convey the same to the said John B. Frisbee and Bezer Simmons as aforesaid, and that I will, and my heirs executors and administrators shall warrent and defend the same to the said John B. Frisbee and the said Bezer Simmons their heirs and assigns against the lawful claims and demands of all persons.

And for the consideration aforesaid and for divers other good and valuable considerations I Luiza

Martinez wife as aforesaid of the said Victor Castro, I do hereby release and quit claim unto the said John B. Frisbee and Bezer Simmons their heirs and assigns all my right claim or passability of dower or other interest in or out of the afore-discribed premises.

In Witness Whereof we the said Victor Castro and Loisa Martinez his wife hereunto set our hands and seals this twenty eighth day of May A. D. eighteen hundred and fifty.

VICTOR CASTRO (L S)

Executed and delivered in the presence of
(the word "grant" being first interlined)

Witnesses to Victor Castro

VON PRUDEN.

Witness O. LIVERMORE

State of California,
County of San Francisco.

At San Francisco this twenty eighth day of May A. D. eighteen hundred and fifty before me personally appeared Victor Castro known to me as the person executing the foregoing instrument and acknowledged the same to be his free act and deed.

Before me

[Seal] EDW. McGOWAN J. P.

Filed in office Sept. 10, 1853.

(Signed) GEO. FISHER,
Secy.

DEED. FRISBEE TO ASPINWALL.

Know all men by these Presents

That I John B. Frisbee of Benicia in the State of California for and in consideration of five thousand dollars to me paid by William H. Aspinwall of New York the receipt whereof is hereby acknowledged have granted, bargained, sold, released and conveyed, and by these presents do grant, bargain, sell release and convey unto the said William H. Aspinwall his heirs and assigns one half of all my right, title, interest & Estate in and to that tract of land situated near the Straits of Carquinas in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it on the Northward the said tract of land being known as "Isla de la Yegua" or Mare Island being the same tract of land granted by Juan B. Alvarado Gov. of California to Victor Castro by grant or patent dated the twentieth day of May, A. D. 1841, and by said Castro conveyed to said John B. Frisbee and Bezer Simmons on the twenty eighth day of May A. D. 1850—meaning hereby to convey to said William H. Aspinwall his heirs and assigns one quarter part of the whole of said Island excepting from the whole of said Island the one tenth part and the one sixteenth part of which have heretofore been conveyed by said Frisbee and Simmons to Victor Castro and William P. McArthur with all the privileges and appertenances thereto belonging.

To Have and to Hold the said described and conveyed premises to said William H. Aspinwall his heirs and assigns, that I am lawfully seized in fee of the aforesaid premises, and that they are free from all encumbrances, that I have good right to sell and convey the same to the said William H. Aspinwall as aforesaid and that I will, and my heirs executors and administrators shall warrant and defend the same to the said William H. Aspinwall his heirs and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof the said John B. Frisbee have hereunto set my hand and seal this fifteenth day of August A. D. 1850.

JOHN B. FRISBEE.

Signed, Sealed and delivered in presence of
H. W. Halleck
John B. Peachy.

State of California,
County of San Francisco.—ss.

On this 15th day of August A. D. 1850 before me Thomas Tilder a Notary Public duly commissioned for the County aforesaid personally appeared John B. Frisbee to me known to be the person described in and who executed the within and foregoing deed and asknowledged that he executed the same of his own free act and deed for the purposes therein set forth.

Given under my hand and seal the day and year last above written.

[Seal] THOMAS TILDER
Notary Public

Filed in office Oct. 19, 1854.

(Signed) GEO. FISHER,
Secy

DEED. CASTRO TO BISSELL.

Know all me by these presents that I Victor Castro of the township of Contra Costa and County of Contra Costa in the State of California for and in consideration of the sum of eighteen hundred dollars to me in hand paid by George W. P. Bissell of the City of San Francisco and the State aforesaid at or before the execution and delivery hereof the receipt whereof I do hereby acknowledge, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Geo. W. P. Bissell his heirs and assigns forever all my right, title and interest in and to the one undivided tenth part (1/10th) of the tract of land situated in the State of California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek, the said Creek bounding the said tract to the Northward which said tract of land is called "Isla de la Yegua" or Mare Island, and being the same tract of land originally granted to said Castro by Juan B. Alvarado Gov. of Cali-

fornia by grant bearing date the 20th day of May A. D. 1841 and by the said Castro conveyed to John B. Frisbee and Bezer Simmons by deed bearing date the 28th day of May A. D. 1850, and the above one tenth part of said land reconveyed by the said Frisbee & Simmons to the said Castro by deed bearing date the 28th day of May A. D. 1850.

To Have and to Hold the said one undivided tenth part with all the appertenances unto the said Geo. W. P. Bissell his heirs and assigns to his and their own use and behoof forever. And I the said Victor Castro for myself and my heirs, executors and administrators do covenant to and with the said George W. P. Bissell his heirs and assigns that I am lawfully seized in fee of the afore granted premises that they are free from all encumbrances that I have good right to sell and convey the same to the said Geo. W. P. Bissell as aforesaid and that I will and my heirs, executors and administrators shall warrent and defend the same to the said Geo. W. P. Bissell his heirs and assigns against the lawful claims and demands of all persons, and failing so to do I the said Victor Castro for myself and my heirs, executors and administrators do covenant with the said Geo. W. P. Bissell his heirs and assigns that I will and my heirs, executors and administrators shall be held in damages to the said Geo. W. P. Bissell his heirs and assigns in such sum as the said Geo. W. P. Bissell his heirs and assigns may sustain not exceeding the sums mentioned in the consideration of these presents.

In Witness Whereof I the said Victor Castro have hereunto set my hand and seal this twentieth day of July in the year of our Lord one thousand eight hundred and fifty two.

[Seal] VICTOR CASTRO

Signed, Sealed and delivered in presence of
CHAS. H. H. CORK.
S. W. MOORE.

State of California,
City and County of San Francisco.—ss.

On this 20th day of July A. D. 1852 before me a Notary Public in and for the City and County of San Francisco, State aforesaid, personally appeared Don Victor Castro to me well known to be the person described in and who executed the foregoing conveyance and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[Seal] SAMUEL W. MOORE
Notary Public

Filed in office Oct. 20, 1854.

(Signed) GEO. FISHER,
Secy.

DEED, FRISBIE AND SIMMONS TO V. CASTRO.

Know all men by these presents that we John B. Frisbee of Benicia and Bezer Simmons of San Francisco of California for and in consideration of Ten thousand dollars to me paid by Don Victor Castro of Contra Costa in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said Castro, his heirs and assigns, one undivided tenth part (1/10) of the tract of land situated in California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek the said Creek bounding the said tract to the northward which said tract of land is called "Isla de la Yegua" or Mare Island and the same tract of land this day conveyed by said Castro to said Frisbee and said Simmons it having been originally decreed to said Castro by grant from Juan B. Alvarado, Gov. of California, dated the 20th day of May, A. D. 1841.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said Victor Castro, his heirs and assigns to his and their own use and behoof forever.

And we the said John B. Frisbee and Bezer Simmons for ourselves and our heirs, executors and administrators, covenant to and with the said Castro his heirs and assigns that we are lawfully seized in fee of the aforegranted premises that they are free from all incumbrances that we have good right to

sell and convey the same to the said Castro as aforesaid and that we will and our heirs, executors and administrators shall warrent and defend the same to the said Castro, his heirs and assigns against the lawful claims of all persons whatever.

In Witness Whereof I, John B. Frisbee and I, Bezer Simmons acting by my attorney in fact Frederick Billings duly authorized by power of attorney dated December 26 A. D. 1847 recorded in archives of San Francisco Book M of Deeds, page 70, hereto set our hands and affix our seals at San Francisco this twenty-eighth day of May the year Eighteen hundred and fifty at San Francisco.

[Seal] JOHN B. FRISBEE,

[Seal] BEZER SIMMONS,
by his attorney in fact
FREDERICK BILLINGS.

Executed and delivered in presence of
ARCHA C. PEACHY,

the word "thousand" interlined, 1st page, fourth written line from top before execution.

VON PRUDEN.

J. MAN'L ALLEN.

State of California,
County of San Francisco—ss.

On this 21st day of July, A. D. 1852, before me the subscriber a Notary Public in and for said county personally came Frederick Billings known

to me to be the person who is the attorney-in-fact of Bezer Simmons executed the within deed and acknowledged to me that he executed the same freely and voluntarily as the act and deed of Bezer Simmons by virtue of a power of attorney for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto subscribed my name and affixed my Notarial Seal the day and year last above written.

[Seal] ROYAL H. WALLER,
Notary Public.

State of California,
County of Sonoma—ss.

On this 28th day of July, A.D. 1852 before me the undersigned County Clerk of Sonoma County personally appeared John B. Frisbee to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal of court affixed at office in City of Sonoma this day and year last above written.

[Seal] JOHN H. BREWSTER
Deputy Clerk of Sonoma County.

Filed in Office, Oct. 20, 1854.

(Signed) GEO. FISHER,
Secy.

DEED. F. BILLINGS, ET AL., ASSIGNEES TO G. W. P. BISSELL.

Know All Men by These Presents, that we, Frederick Billings, James R. Bolton and Henry W. Halleck, all of the City of San Francisco in the State of California, assignees of the real estate and personal property of the late firm of Simmons Hutchinson and Company of the said City of San Francisco, composed of Bezer Simmons and William H. Stowell by virtue of a certain deed duly executed dated the 3d day of September A. D. 1850, recorded in the office of the Records of the County of San Francisco in Book No. 1 Deeds of Trust, page 32. Also assignees of the Real Estate and personal property of the late Bezer Simmons of said San Francisco by virtue of a certain deed duly executed dated the third day of September, A. D. 1852, recorded in the office of the Recorder of the County of San Francisco in Book No. 1, Deeds of Trust, page 29, that we as such assignees and acting under and by virtue of said deeds parties of the first part in consideration of twenty-five hundred dollars to us in hand paid the receipt whereof is hereby acknowledged by George W. P. Bissell of said San Francisco party of the second part have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part his heirs and assigns. All our right, title, interest and claim of in and to the undivided one-half part of Sixty Seven Eightieths (67/80) of Mare Island, so called situated in the Bay of San Pablo

which said Island was provisionally granted by Gov. Jimeno on the 31st day of October, A. D. 1840 and afterwards on the 20th day of May, 1841, granted by Governor Alvarado to Victor Castro, and by said Castro conveyed to Frisbee and Simmons on the 28th day of May, 1850 and the interest of said Simmons conveyed to said assignees as aforesaid.

To Have and To Hold the said mentioned premises with all the appurtenances unto the said party of the second part, his heirs and assigns to his and their use and behoof forever.

In Witness Whereof we the parties of the first part hereto set our hands and seals this the first day of July, the year of our Lord, one thousand eight hundred and fifty-two at San Francisco, aforesaid.

[Seal] FREDERICK BILLINGS
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] H. W. HALLECK,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] JAMES R. BOLTON,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

Executed and delivered in presence of
R. H. WALLER.

State of California,
County of San Francisco—ss.

On this 16th day of July, A. D. 1852 personally appeared before me the subscriber, a Notary Public in and for said County, Frederick Billings, H. W. Halleck and James R. Bolton, known to me to be the individuals described in and who as the assignees of Bezer Simmons and of Simmons, Hutchinson & Co., and who executed the foregoing conveyance and severally acknowledged to me that they executed the same as such assignees freely & voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my Notarial Seal on the day and year last above written.

ROYAL H. WALLER,
Notary Public.

Filed in office, Oct. 20, 1854.

(Signed) GEO. FISHER,
Secy.

DEED. SIMMONS TO BILLINGS, ET AL.

This Indenture made this third day of September A. D. One Thousand Eight Hundred and Fifty between Bezer Simmons of San Francisco in the State of California, party of the first part and Frederick Billings, James R. Bolton and H. W. Halleck of said city, parties of the second part,

Witnesseth that the said party of the first part in consideration of the sum of One Dollar to him in

hand paid by the said parties of the second part the receipt whereof is hereby acknowledged and for the further considerations hereinafter specified, hath given granted bargained and sold and by these presents do give, grant, bargain and sell unto them the said parties of the second part all those lands, tenements and hereditaments lying and being in the State of California which are more particularly specified and described in a Schedule hereto annexed and made part hereof, marked Schedule "A". To Have and To Hold unto them the said parties of the second part, their heirs and assigns forever. In trust, nevertheless and to and for the following uses, interests and purposes that is to say that the said parties of the second part shall take possession of all and singular the said lands & tenements hereby conveyed or intended to be conveyed and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions, and either for cash or upon credit as in his judgment may appear best and most for the interest of the parties concerned and convert the same into money and therefore to execute, acknowledge and deliver good and sufficient deeds and instruments of conveyance necessary to effect a sale and transfer of any and all estates and property hereby conveyed or intended so to be, and by and with the proceeds of such sales the said parties of the second part shall first pay and disburse all the just and usual expenses, costs, charges and commissions of making executing and convey-

ing unto full effect this assignment and the objects thereof and the residue of the proceeds of such sales shall be considered as the nett avails or proceeds of the property hereby conveyed.

And first by and with the said nett proceeds of the said parties of the second part shall pay and discharge in full all the debts, obligations and demands due or to become due by the party of the first part or in any wise existing against him together with all interest which may be due thereon at the time of payment.

And secondly by and with the rest residue and remainder of said nett proceeds if any shall remain after the payment in full of said debts and private liabilities of the party of the first part, the said parties of the second part shall pay and discharge the partnership debts mentioned in the deed of assignment this day made by the said Bezer Simmons and William H. Stowell to the said parties of the second part and hereby referred to according to the order and arrangement established by the said deed for the payment of the debts therein mentioned or referred to.

And the said party of the first part also assigns and conveys to the said parties of the second part all the goods, chattels, vessels, boats and personal property of any kind mentioned in the said Schedule "A" hereto annexed in which for the uses and purposes herein set forth as those to which the proceeds of the Real Estate above conveyed are to be devoted.

In testimony whereof the party of the first part hath hereunto set his hand and affixed his seal on the day and year first herein written.

BEZER SIMMONS.

Signed, sealed and delivered in presence of
ARCHA C. PEACHY,
C. TEMPLE EMMETT.

State of California,
County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. 1850 personally appeared before me a Notary Public in and for said County Bezer Simmons well known to me to be the party described in and who executed the foregoing instrument and acknowledged that he executed the same freely and voluntarily and for the purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and official seal the day and year above written.

[Seal] C. TEMPLE EMMETT
Notary Public

SCHEDULE "A"

Schedule of property belonging to Bezer Simmons referred to in his deed of assignment.

The Rancho known as Novato Rancho in Marin County purchased of Jacob P. Luse and Rosalia Vallejo his wife November 24, 1846, save a small

portion heretofore conveyed to Benjamin Franklin Simmons with the improvements and my stock thereon.

Seven sixteenths of the Peninsula forming an area of the Bay of San Diego, purchased of—

The following property in the City of San Francisco.

One undivided half of one hundred vara lot numbered eighty eight. Forty varas by fifty varas of fifty vara lot numbered two hundred and eighty five.

Western half of fifty vara lot numbered two hundred and three. Southern half of lot numbered thirty eight fifty vara lot.

About one hundred and forty five lots in Sacramento City the exact number and locality of the same can be ascertained by the origimal deeds of John A. Sutter to said Simmons dated November 24th A. D. 1849, and recorded in Sacramento and certain deeds of the lots so conveyed by Sutter given by me to Betheul Phelps, Isaac Y. Matt, Alice Farnham, Franklin N. Billings and Mrs. Ann S. Kegler.

The following property in the City of Benicia viz., The Western half of Lot One (1) in block (5). Lot Six (6) in block Twenty Six. Lot Sixteen (16) in block Forty Seven. Lot Fourteen (14) in Block Forty Eight. Lot Six in block Fifty. Lot Sixteen in Block Fifty One. Lot Sixteen in block Fifty Three.

One undivided fourth part of the ship Magnolia.

A note for two thousand dollars signed by John F. Pope.

Recorded in Co. Recorders office Sept. 4th 1850 10 A. M. in Book No. 1 of deeds of trust p. 29.

JOHN A. McGLYNN,
County Recorder

By JAMES O'GRADY,
Deputy

Filed in office Nov. 7th, 1854.

(Signed) GEO. FISHER,
Secy.

DEED.

SIMMONS & STOWELL TO BILLINGS, ET AL.

This Indenture made this third day of September in the year one thousand eight hundred and fifty between Bezer Simmons and William H. Stowell copartners in trade and business under the name firm and style of Simmons Hutchinson & Co. of the first part and Frederick Billings, James R. Bolton and H. W. Halleck, of the City of San Francisco parties of the second part,

Witnesseth.

That whereas the said copartnership is jointly indebted in sundry considerable sums of money and by reason of severe losses which have recently attended its business operations has become unable to pay and discharge all its liabilities with punctuality

in full, and the said parties of the first part are now desirous of making a fair and just distribution of their property and effects among their creditors.

Now therefore this Indenture Witnesseth that said parties of the first part in consideration of the premises and the sum of one dollar to each of them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged have granted, bargained and sold, released, assigned transfered and set over and by these presents do grant, bargain, sell, release, assign, transfer and set over unto the said parties of the second part and to their heirs and assigns forever all and singular the lands, tenements and hereditaments situate, lying and being within the State of California also all the goods, chattles, steamboats, merchandize, bills, bonds, notes, book accounts, claims, demands, choses in action, books of account, evidences of debt and property of every name, nature and description whatever and wheresoever of the said Bezer Simmons and William H. Stowell the parties of the first part more particularly enumerated and described in the schedule hereto annexed marked "A" and made part of this Indenture.

To Have and to Hold the same and every part and parcel thereof with the appurtenances to the said parties of the second part their heirs and assigns forever.

In trust nevertheless and to and for the following uses, intents and purposes that is to say the said parties of the second part shall take posses-

sion of all and singular the lands, tenements and hereditaments and all other property hereby assigned or intended so to be, and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions and either for cash or upon credit as in their judgment may appear best and most for the interest of the parties concerned, and covenant the same unto money, and also to collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands, and choses in action, or so much thereof as may prove collectable and therefore to execute, acknowledge and deliver good and sufficient deeds, bills of sale, releases and all other instruments of conveyance that may be necessary and proper to effect a sale and transfer of any and all the estates, property and effects hereby conveyed or intended so to be and by deed with the proceeds of such sales and collections the said parties of the second part shall first pay and disburse all the just, reasonable and usual expenses, costs, charges and commissions of making and conveying into effect this assignment and the objects thereof and the residue of the proceeds of such sales and collections shall be considered as the nett avails or proceeds of the property and effects hereby assigned.

And first by and with the said proceeds the said parties of the second part shall pay and discharge in full the following sums of money to the persons to whom they are respectively due, that is to say George H. Howard three thousand dollars ($3000)

to Flint Peabody & Co. three thousand dollars ($3000) to Wells & Co. two thousand dollars ($2000) with legal interest from the date of this assignment. The said debts are mentioned in Schedule "B". And secondly by and with the residue and remainder of said nett proceeds if any shall remain after the payment in full of the debts and liabilities mentioned in Schedule "B" the said parties of the second part shall pay and discharge all sums of money due upon deposit made with the firm of Simmons Hutchinson & Co. when said firm was composed of Bezer Simmons, William H. Stowell, John F. Pope and Titus Hutchinson as well as when composed of the said parties of the first part provided that said deposits were made without arrangement between the depositors and the said firm of Simmons Hutchinson & Co. that the money or gold dust deposited should bear interest, and also whatever sums of money shall be due or become due to the owner of the Steamer Gold Hunter. The above mentioned debts which are set forth in Schedule "C" shall be paid in full if such remainder shall prove sufficient for that purpose and if unsufficient then the parties of the second part shall apply such remainder to the payment and liquidation of said debts and demands mentioned in Schedule "C" pro rata share and share alike according to their respective amounts as far as such remainder will *satnd* for that purpose and in the foregoing class of creditors shall be included the firm of G. S. Robbins & Son of the City of New York Bankers the

amount of indebtedness to whom is stated in said Schedule "C".

And thirdly by and with the rest, residue and remainder of said nett proceeds if any shall remain, after paying & discharging the debts and demands aforesaid the said parties of the second part shall pay & discharge all the other copartnership debts demands and liabilities whatsoever now existing whether due or hereafter to become due against the firm of Simmons Hutchinson & Co. when composed of the said Bezer Simmons, Titus Hutchinson, John F. Pope and William H. Stowell partners as well as when the said firm was composed of the parties of the first part partners therein provided such remainder shall prove sufficient for that purpose and if insufficient then said parties of the second part shall apply such remainder to the payment and liquidation of such debts & demands pro rata share and share alike according to their respective amounts as far as such remainder will extend for that purpose.

And lastly the said parties of the second part shall return the surplus if any remain after paying the debts and demands aforesaid to the said parties of the first part their executors, administrators, or assigns and for the better execution of these presents and of the several trusts hereby reposed the said parties of the first part do hereby make, nominate, constitute and appoint the said Frederick Billings their and each of their true and lawful attorney irrevocable with power of substitution and

revocation with full power and authority in the name of the said parties of the first part and their and each of their legal representatives or otherwise to do, transact and perform all acts, deeds, matters and things in the full execution of these powers.

And the said parties of the first part for themselves and their and each of their heirs, executors and administrators covenant and agree to and with the said parties of the second part that they will when requested make or cause to be made such further assignments, deeds and conveyances as shall be necessary to carry into full and complete effect the intentions of the parties to these presents.

It is understood that this deed of assignment is a deed of trust for the lawful benefit of the creditors of the present firm of Simmons Hutchinson & Co. composed of the parties of the first part and also the creditors of the firm of Simmons Hutchinson & Co. as it was formaly constituted when Titus Hutchinson and John F. Pope were also partners aside from the preference hereinbefore given to certain creditors, the creditors of the two firms doing business under the same name being treated alike.

In testimony whereof the parties to the first part have hereunto set their hands and affixed their seals on this third day of September A. D. one thousand eight hundred and fifty.

BEZER SIMMONS.

W. H. STOWELL.

Signed, Sealed and delivered in the presence of the words "creditors of the" having been interlined on the last line of the fith page before the execution hereof.

ARCHA C. PEACHY
C. TEMPLE EMMETT.

State of California,
County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. eighteen hundred and fifty personally appeared before me a Notary Public within and for said County Bezer Simmons and William H. Stowell well known to me to be the parties described in and who executed the foregoing instrument and each acknowledged that he executed the same freely and voluntarily and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal affixed the day and year above written.

[Seal] C. TEMPLE EMMETT
Notary Public

SCHEDULE "A"

Property belonging to Simmons Hutchinson and Company being Schedule "A" referred to in the foregoing deed of assignment.

Beach and Water Lot No. One hundred and twenty one with store thereon situated on Clay Street between Montgomery and Sansome, mort-

gaged to Wells & Co. to secure the payment of a note for fifteen thousand dollars.

Three Fifteenths (3/15) of Steamer Gold Hunter mortgaged to Wells & Co. to secure the payment of a note for Twenty five thousand dollars.

Ten twenty-fourths (10/24) of Steamer McKim mortgaged to Wells & Co. to secure the payment of a note for Fifteen thousand dollars.

One undivided half of twenty lots bought of Dr. B. F. Edwards and situated on Chestnut, Jones and Greenwich Streets on the North Beach.

Lot on Front Street, Sacramento City, between "M and N" twenty-five feet front and one hundred and sixty feet deep to an ally with the store thereon.

One undivided half of Sixty-seven Eightieths (67/80) of Mare Island in San Pablo Bay.

Lot on M Street in Vernon with store thereon, said lot being twenty five feet front and one hundred twenty-five feet deep.

About Eight hundred lots in Vernon and an individual interest in the lands adjoining the town.

One undivided sixth part of the Rancho known as Llano Seco on the Sacramento River.

One half of Steamboat building by Watters Butcher & Co. at Rincon Point.

One Eighteenth of Steamer Hartford and one eighteenth of her dividens since July 1st.

Three Eighths of Steamer Bute.

One third of Bark Whitace.

One fourth of Bark Dinan.

Storeship Florence with Scows, Launches and Boats.

About two hundred thousand feet of lumber on the North Beach.

About one hundred thousand feet of lumber at Alviso.

About thirty thousand feet of lumber at Sacramento City.

About Sixty thousand shingles at do, do.

Counting Room furniture consisting of Desks, Safes, Gold Scales, Stoves, etc.

Lot in Block fifteen in Town of Benicia.

A large amount of Book accounts and notes due the said firm of Simmons Hutchinson & Co., the amount of which will be particularly ascertained by reference to the backs of said notes.

Small amount of merchandise in store.

Recorded in Co. Recorder's office, Sept. 4, 1850 at 10 a. m. in Book No. 1 Deeds of Trust, on page 32.

JOHN A. McGLYNN,
County Recorder.

By JAS. O'GRADY,
Deputy.

Filed in office, Nov. 7, 1854.
(Signed) GEO. FISHER,
Secy.

OPINION OF THE BOARD DELIVERED BY COMMISSIONER S. B. FARWELL.

GEORGE W. BISSELL, ET AL.,

vs.

THE UNITED STATES.

For a Place called Mare Island in the Bay of San Francisco in the County of Sonoma.

The claimants in this case ask confirmation of their title which they derive from Victor Castro, by virtue of a grant issued to the said Castro, on the 20th day of May, 1841, by Governor Juan B. Alvarado, and have offered in evidence in support of their claim the original grant to the said Castro, and also various deeds of conveyance from different persons through whom the title has passed from the said Castro showing a correct chain of title from the said Castro of his interest to the present claimant.

Strong suspicion has been raised by the testimony as to the genuineness of the grant.

It is written on the back of the same half sheet that contains a provisional grant to the same party executed by Manuel Jimeno, acting as Governor on the 31st day of October, 1840. And it would seem from inspection of the document that it would be highly impossible that any person whose attention was drawn to the inspection of the document and examine the contents of the first and provisional grant without noticing the contents of the second page, as it is written in quite a heavy hand and shows quite

plainly through the paper. Mr. Misner, a witness on the part of the government, testifies that a document similar to the provisional grant now under consideration and in his opinion the same one, was handed to him sometime in the year 1850 to be translated with the view of getting advice as to the legal effect, and he says that he translated that part of the document, and did not observe anything that now appears on the other side of the paper.

Stephen Cooper swears that sometime in 1850 he saw a similar paper, which was shown to him by Mr. Frisbie, one of the then claimants of the Island in order to show witness that he, Frisbie, had a title to the Island, and he said to Mr. Frisbie, "It was strange that this writing appears here now, and it was not here in the winter of 1847 and 1848." And says that he does not know whether he formed his impressions that the grant was attached after 1848, by former inspection of the documents or from heresay.

Mr. McDonald's testimony is similar to that of Mr. Cooper.

There is no doubt but that the body of the grant on the second page is in the hand writing of Governor Alvarado, and that his signature thereto is genuine.

The only question is as to the time the same was made and executed.

Governor Alvarado as a witness in the case, and swears positively that he wrote the grant and signed

it himself at the time and place that it purports to have been done.

The testimony on the part of the government is of a negative nature, while that of Governor Alvarado is positive and of course under the rule of law in constructing testimony when the witness in other respects stands unimpeached he must receive greater weight when he affirms facts of a positive nature, and in which he could not be mistaken.

In the present case Governor Alvarado could not be mistaken as to the facts that he has sworn to. He either did execute the grant officially as Governor at the time it purports to have been done, or he committed a forgery in the subsequent execution thereof and perjury in swearing to the time and place of its execution, for the case presents a state of facts in which Governor Alvarado could not well be mistaken, and, from the facts before us we do not feel warranted in discrediting entirely the testimony of Governor Alvarado, and if any force is given to it, it must be for the full extent of his statements, and in that event, this claim must be confirmed and a decree herein will be entered accordingly.

Filed in office, May 8, 1855.

(Signed) GEO. FISHER,

Secy.

GEORGE W. BISSEL, ET AL.,

vs.

THE UNITED STATES.

DECREE OF CONFIRMATION.

In this case after hearing the proofs and allegations, it is adjudged by the Commission that the claim of the said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

R. AUG THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office, May 8, 1855.

(Signed) GEO. FISHER,
Secy.

ORDER.

And it appearing to the satisfaction of this Board that the land hereby adjudicated is situated in the Northern District of California, it is hereby ordered that two transcripts of the proceedings and of the decisions in this case, and of the papers and evidence upon which the same are founded be made out and duly certified by the Secretary, one of which

transcripts shall be filed with the clerk of the United States District Court for the Northern District of California and the other be transmitted to the Attorney General of the United States.

Office of the Board of Commissioners,

To ascertain and settle the Private Land Claims in the State of California

I, George Fisher, Secretary of the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, do hereby certify the foregoing sixty-nine pages, numbered from 1 to 69, both inclusive, to contain a true, correct and full Transcript of the Record of the Proceedings and of the Decision of the said Board, of the Documentary Evidence and of the Testimony of the Witnesses, upon which the same is founded, on file in this Office, in Case No. 307 on the Docket of the said Board, wherein G. W. P. Bissel and William H. Aspinwall are the Claimants against the United States, for the place known by the name of "Ysla de Yegua" or "Mare Island."

In Testimony Whereof, I hereunto set my hand and affix my private Seal (not having a Seal of Office) at San Francisco, California, this twentieth day of October A. D. 1855, and of the Independence of the United States of America the eightieth.

[Seal] GEO. FISHER,
Secy

[Endorsed]: U. S. District Court. S. F. U. S. vs. Stewart, No. 2685. U. S. Exhibit D-1. Filed June 8, '37. W. B. Maling, Clerk.

U. S. EXHIBIT D-2

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7522

James E. O'Donnell, et al.,

Appellants,

vs.

United States of America,

Appellee.

CERTIFIED COPY OF TRANSCRIPT IN CAUSE No. 311, N. D. IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Volume II

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims in the State of California

San Francisco, Oct. 20th, 1855.

J. A. Monroe Esq.
Clerk of the U. S. District Court for the Northern District of California.

Sir;

I herewith transmit you, pursuant to the requirements of the Act of Congress, approved August 31st, 1852, a Transcript of the Record of the Proceedings and of the Decision of this Board, of the Documentary Evidence and of the Testimony of the witnesses upon which the same is founded, in Case No. 307 on the Docket of the said Board, wherein G. W. P. Bissel & William H. Aspinwall are the Claimants against the United States, for the place known by the name of "Ysla de Yegua" or "Mare Island," and request your receipt for the same.

I am, Respectfully,

Your Ob't Servant,
GEO. FISHER, (Sec.)

No. 311

U. S. District Court

Northern Dist. of Cal.

United States

v.

G. W. P. Bissell et al;

NOTICE OF APPEAL

in Case No. 307

Filed Febry 1, 1856

By CHEVERS,
Deputy

Office of the Attorney General of the United States,
Washington, 3 December, 1855.

307 "Ysla de la Yegua," or "Mare Island" G. W. P. Bissel & William H. Aspinwall Claimants.

You will please take notice that in the above case, decided by the Commissioners to ascertain and settle private land claims in the State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 20 day of November, 1855, the appeal in the district court of the United States for the Northern district of California will be prosecuted by the United States.

C. ANTHONY
Attorney General.

No. 311

U. S. District Court

The United States

vs.

G. W. P. Bissell &
Wm. H. Aspinwall

PETITION

Filed Feby 18th, '56

To the Honorable District Court of the United States in and for the Northern District of California.

No. 311

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and
WILLIAM H. ASPINWALL.

The Petition of the United States, by their Attorney represents: that this cause is an application for a review of the decision of the Board of Commissioners whereby the claim of the said Appellees was confirmed as appears by reference to the records in the case: That a transcript of the said Records was filed in this Court on the 1st day of May, 1855; that a notice of appeal was filed on the 1st day of

Aug. 1855 and that the land claimed lies in the said District. That the said claim is invalid.

Wherefore Appellants pray that the said decision of the Board be reversed & that this court decree the said title to be invalid.

Respectfully &c
S. W. INZE
U. S. Dist. Atty.

No. 311

The United States,
Appellants
vs.
G. W. P. Bissell & W. H. Aspinwall
Appellees

ANSWER OF APPELLEES

Filed Feby 18, '56

Halleck Peachy & Billings
Attys for Appellees

No. 311

In the United States District Court for the Northern District of California.

Transcript No. 307

Mare Island

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL & WM. H. ASPINWALL,

Appellees.

George W. P. Bissell and William H. Aspinwall, appellees, appear by their attorneys, and for answer to the petition of the United States filed herein, say:

That their title to the tract of land called "Ysla de la Yegua" (Mare Island), as set forth and described in their petition to the Board of Commissioners and in the documentary and other evidence filed in this case is a good and valid title; that the land claimed is situate in the Northern Dist. of California and within the jurisdiction of this court.

And they pray this Honorable court to affirm the decision of the Board of Commissioners, and to decree their title to be valid.

HALLECK, PEACHY & BILLINGS
Attys. for Appellees.

No. 311

The United States, Appellants

vs.

Bissell & Aspinwall, Appellees.

INDEX OF CASE

Halleck, Peachy & Billings
Attys. for Appellees.

No. 311

CLAIM OF G. W. P. BISSELL AND WM. H. ASPINWALL TO MARE ISLAND, ABOUT ½ A LEAGUE, IN SONOMA COUNTY

The Transcript in this case (No. 307) contains

I. Petition to Commissioners pp 3 to 5

II. Deposition of S. Cooper (for Government) pp 5 to 8
In 1850 a paper was shown him by Capt. Frisbie; it was translated by Mr. Misner; thinks the paper shown him is the same but is not certain; heard that the paper had been altered, but is not certain that he saw it himself previously.

III. Deposition of J. B. Alvarado (for Claimants) pp 9 to 18
Proves genuiness of title papers, and that he signed the grant as governor at the time the title bears date. Thinks the title was signed in Monterey & that Jimeno reported to him on the application & that he had given the previous grant to occupy the Island; but does not now remember the circumstances. Was only once on the Island; it was then occupied by Castro with horses.

IV. Deposition of M. G. Vallejo (for claimants) pp 19 & 20
Knows the land claimed; it is an Island at the mouth of Napa Creek in San Pablo Bay; contains about half a league, a little more or less. Victor Castro put

horses on the Island in 1839 or 40, and built a corral and kept them there till 1850; he had some 70 or 80 horses there; saw the title papers some 12 years ago; examines originals filed in this case and identifies them as the same he saw 12 years ago.

V.	Juan Josè Castro (for claimants) Witness assisted Victor Castro in putting horses on the Island in 1840; he built a corral and left Indians to take care of the stock.	pp 21 to 25
VI.	Deposition of W. McDaniel (for Govt) Knows nothing about the title but hearsay.	pp 25 to 27
VII.	Deposition of L. B. Mizner (for Govt) About 1850 translated a paper like the 1st page of original title in this case; don't know that it was the same paper; don't know the handwriting; thinks the 2d title was not on it; did not see it; is not certain what year he read it.	pp 27 to 28
VIII.	Espediente and Translation	pp 29 to 34
IX.	Original grants	p 35
X.	Translation	pp 37 & 38
XI.	Deeds of transfer & translations, from the grantee Castro to present claimants	pp 39 to 64
XII.	Opinion of the Board	pp 65 to 67
XIII.	Decree of Confirmation	p 68

Proceedings in U. S. Dist. Court

1st	Transcript	filed	Oct 23d 1855
2d	Notice of Appeal	"	Feby 1st 1856
3d	Petition for Review	"	Feby 18 1856
4th	Answer of Claimants	"	Feby 18 1856

The United States being now the owner of the titles of appellees, a confirmation of this claim inures to the benefit of Government, and no objection is therefore made to a decree in favor of the validity of the claim.

No. 311

In the U. S. Dist. Court
for the Northern Dist. of Cala.

Mare Island

The United States
Appellants

vs.

G. W. P. Bissell &
W. H. Aspinwall
Appellees

DECREE OF CONFIRMATION

H. P. & Billings
Attys for Appellees

No. 311.

In the United States District Court in and for the Northern District of California.

Transcript No. 307. Mare Island.

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,

Appellees.

Stated Term of the Court, March 2d, 1857. Hon. Ogden Hoffman, Judge.

On appeal from the final decision of the Board of Commissioners to ascertain and settle Private Land claims in the State of California.

DECREE.

This cause came on to be heard at a stated term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California under the Act of Congress approved on the 3d of March A. D. 1851, rejecting the claim.

Upon the Transcript of the proceedings, and decision of the said Board of Commissioners, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said Transcript has been duly filed according to law and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim and that the said claim be and the same is hereby confirmed to the said "Isla de la Yegua" or "Mare Island" with its natural boundaries.

311

United States District
Court, Northern District
of California

The United States

vs.

G. W. P. Bissell &
Wm. H. Aspinwall

ORDER GRANTING APPEAL

Filed April 1st, 1857

JOHN A. MONROE,
Clerk
By W. H. CHEVERS,
Deputy

At a Stated Term of the District Court of the United States of America, for the Northern District of California, held at the Court Room, in the City of San Francisco, on Wednesday the first day of April in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable Ogden Hoffman, District Judge.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In this case on application of the U. S. Attorney made in open Court, it is Ordered by the Court that

an appeal in behalf of the United States from the final decision of this Court rendered at the present term, be and the same is hereby granted; and that a certified transcript of the pleadings, evidence, depositions and proceedings in the said cause be sent to the Supreme Court without delay.

311

U. S. Dist. Court

The United States

v.

Bissell & Aspinwall

STIPULATION

In the District Court of the United States for the Northern District of Cala.

D. C. 311; L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In pursuance of notice from the Attorney General of the United States, it is hereby stipulated and agreed that the appeal to the Supreme Court of the United States heretofore g[illegible]nted in this case, be vacated, and that claimants have leave to proceed.

under the decree of this Court heretofore rendered in their favor, as under Final Decree.

San Francisco, ... 1857.

HALLECK, PEACHY & BILLINGS,
Attys. for Appellees.

311

United States District Court
Northern District of California

The United States

vs.

Bissell & Aspinwall

ORDER VACATING APPEAL

Filed ....., ..., 185.....

.....
Clerk

By.....
Deputy

At a Stated Term of the District Court of the United States of America, for the Northern District of California, held at the Court Room, in the City of San Francisco, on ..... the ..... day of ..... in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable Ogden Hoffman, District Judge.

D. C. 311: L. C. 307

THE UNITED STATES

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

The Attorney General of the United States having given notice that appeal in this case will not be prosecuted, and a stipulation to that effect having been entered into by the District Attorney:

On motion of the District Attorney it is Ordered, Adjudged and Decreed that the appeal heretofore granted in this case to the Supreme Court of the United States be vacated, and that claimants have leave to proceed under the decree of this Court heretofore rendered in their favor, as under Final Decree.

No. 311

Southrn Division
In the District Court of the
United States for the
Northern District of California

United States of America
Appellant,

vs.

C. W. F. Bissell and W. H.
Aspinwall
Appellees,

DECREE NUNC PRO TUNC

Filed and entered April 15, 1930 Nunc pro tunc as of March 2, 1857.

WALTER B. MALING,
Clerk
By J. A. SCHAERTZER,
Deputy.

Entered in Vol. 25 Judg. and Decrees at page 267.

In the Southern Division of the United States District Court for the Northern District of California.

No. 311—Transcript No. 307. Mare Island.

UNITED STATES OF AMERICA,

Appellant,

vs.

G. W. P. BISSELL and W: H. ASPINWALL,

Appellees.

On appeal from the final decision of the Board of Land Commissioners to ascertain and settle private land claims in the State of California under the Act of Congress, approved on the 3rd day of March, 1851.

DECREE NUNC PRO TUNC.

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in the State of California, under the Act of Congress, approved the third of March, A. D. 1851, upon the transcript of the proceedings and the decision of said Board of Commissioners confirming the claim of the Appellees and the predecessors in interest, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said transcript has been duly filed according to law, and Counsel for the respective parties having been heard, it is by

the Court hereby ordered, adjudged and decreed, that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed, that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the said "Isla De LaYegua" or "Mare Island" with its natural boundaries.

It Further Appearing by the minutes, records and proceedings of this court, that on March 2nd, 1857, the above entitled Court made its Order duly entered in the minutes of said Court, directing the entry of a Decree of Confirmation in the above entitled matter by consent of the United States District Attorney, and that by accident, oversight, inadvertence or excusable neglect, no decree in conformity with said Order and Judgment has as yet ever been entered herein, and that the files of the Clerk of this Court contain an unsigned decree confirming the said decision of the said Board of Land Commissioners, and that this case is still pending and undecided herein;

And It Further Appearing, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no

rights of third persons have intervened or could intervene.

Now, Therefore, on motion of Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, Attorney for said Appellant, made on the 15th day of April, 1930, that a decree be entered Nunc Pro tunc in conformity with the said Order, and the Court now being fully advised in the premises, the said Motion is hereby granted and it is hereby ordered that this decree of confirmation in said cause confirming in all particulars the decision of said Board of Land Commissioners be entered Nunc Pro Tunc, as of the 2nd day of March, in the year 1857.

Dated in open Court this 15th day of April, 1930.

A. F. ST. SURE,
United States District Judge.

Grant

Governor Alvarado

To

Victor Castro

Mare Island

Copy

Copy

Do not print

91

Copy

Manuel Jimeno Casarin Gobernador interino del Departamento de las Californias.

Gobierno Político de la Alta Cal.ª Inte

Se le permite provisionalmente mientras se practican las diligencias de estilo, á Don Victor Castro ocupe con Caballada la Isla nombrada la Yegua en el Estrecho de los Carquines, sugetandose al sentado q. produzca las citadas diligencias:

En consecuencia entreguese este permiso al interesado para su resguardo

Monterey 31 de Oct de 1840

(Firmado) Jimeno

(Firmado) José L. Fernandez
Sub interino

Copia

Juan B Alvarado. Gob.º Constitucional Proprietario del Departamento de Californias.

Por cuanto Don Victor Castro Mejicano por nacimiento ha pretendido á este Gob.º la propiedad de la Isla nombrada la Yegua situada á las inmediaciones del Estrecho de Carquines, en cuya consequencia se le concedio la licencia q. antecede del Sr Don Manuel Jimeno Casarin encargado interinamente de este Gob.º y en virtud de q. el Solicitante ha repetido nuevamente sus instancias probando q. la dicha Isla no pertenece á la propiedad de

de algun individuo, pueblo, incorporacion, he tenido en decreto este dia en declarar como declaro por el presente, á Don Victor Castro dueño en propiedad de la referida Ysla en todo su estencion conforme á las facultades q. me son conferidas por el Supremo Gob.º Nacional.

En consequencia entreguese este al interesado para que usen de titulo y para su resguardo y de mas fines que le convenga.

Dado en Monterey Capital del Departamento, á los dos dias del mes de Mayo de 1847.

(Firmado) Juan B. Alvarado.

Victor Castro

to

Frisbie and Simons

DEED

This conveyance made and entered into this twenty-fifth day of October in the year of our Lord one thousand eight hundred and forty-nine by Victor Castro, by Mariano G. Vallejo, his attorney, party of the first part and Bezer Simons and John B. Frisbie, witnesseth that the said Victor Castro for and in consideration of the sum of seven thousand five hundred dollars the receipt whereof is hereby acknowledged hath bargained and by these presents doth grant, bargain and sell unto the said Bezer Simons and John B. Frisbie all that tract and parcel of land known as Mare Island situate in San Pablo Bay at the mouth of Napa Creek.

To have and to hold the above released premises the said Bezer Simons and John B. Frisbie, their heirs and assigns to their use and behoof forever.

In Witness Whereof the said Victor Castro by Mariano G. Vallejo, his attorney, as aforesaid hath hereunto set his hand and seal this twenty-fifth day of October in the year of our Lord one thousand eight hundred and forty-nine.

[Seal] VICTOR CASTRO

[Seal] By MARIANO G. VALLEJO

Sealed and delivered in presence of Thos. G. Peachy, Robert R. Pierpont.

District of Sonoma,
Territory of California.

Personally appeared before me Prefect for the District of Sonoma the above named M. G. Vallejo who acknowledged the above signature to be his deed that the above deed was executed for the purposes therein mentioned by Victor Castro by power of attorney granted to said Vallejo.

Witness my hand and seal this 30th day of October, 1849.

[L. S.] CHAS. P. WILKINS,
Prefect for Sonoma District.

Recorded Nov. 3d, 1849.

State of California,
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of record in my office in Book A, page 442 of Solano County Records

Witness my hand and seal this the 9th day of April, A. D. 1859.

[Seal] WM. J. HOOTON,
County Recorder of said county.
By PERRY WILLIAMS,
Dep. Recorder

DEED

Victor Castro & Loisa Martinez
to
John B. Frisbie & Bezer Simmons
Mare Island

Copy

Know all men by these Presents.

That I Victor Castro and Luisa Martinez of Contra Costa in the State of California, for and in consideration of seven thousand five hundred dollars to us paid by John B. Frisbie of Benicia and Bezer Simmons of San Francisco in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said John B. Frisbie and Bezer Simmons their heirs and assigns all that tract of land lying and being in said California and described as follows viz. Being that tract of land situated near the Straits of Carquinez in the Bay of San Francisco; and at the mouth of Napa Creek, the said Creek bounding it to the Northward, the said tract of land being known as "Ysla de Yegua" or Mare Island being the same land granted to me the said Castro on the twentieth day of May A. D. 1841 by Juan B. Alvarado Governor of California, the original grant being referred to made a part of this deed and herewith transferred to the said Frisbie and Simmons.

To Have and to Hold the said described and conveyed premises with all the apurtenances unto the

said John B. Frisbie, and the said Bezer Simmons their heirs and assigns, to them and their own use and behoof forever.

And I the said Victor Castro for myself, my heirs and executors and administrators covenant hereby to and with the said John B. Frisbie and the said Bezer Simmons their heirs and executors administrators and assigns that I am lawfully seized in fee for the afore granted premises, that they are free from all encumbrances, that I have good right to sell and convey the same to the said John B. Frisbie and Bezer Simmons as aforesaid, and that I will my heirs executors and administrators shall warrent and defend the same to the said John B. Frisbie and the said Bezer Simmons their heirs and assigns against the lawful claims and demands of all persons.

And for the consideration aforesaid and for divers other good and valuable consideration I Luisa Martinez wife as aforesaid of the said Victor Castro, do hereby release and quit claim unto the said John B. Frisbie and Bezer Simmons, their heirs and assigns all my right claim or possability of dower or other interest in or out of the aforesaid premises.

In Witness Whereof we the said Victor Castro and Luisa Martinez his wife hereunto set our hands and seals this twenty eighth day of May Anno Domini eighteen hundred and fifty.

(Signed) VICTOR CASTRO (Seal)

Executed and delivered in the presence of
(the word "grant" being first interlined)

Witnesses to Victor Castro
VON PRUDEN.
Witness O. LIVERMORE

State of California,
County of San Francisco.

At San Francisco this twenty eighth day of May A. D. eighteen hundred and fifty before me personally appeared Victor Castro known to me as the person executing the foregoing instrument and acknowledged the same to be his free act and deed.

Before me
[Seal] EDW. GOWAN J. P. (Signed)

Copy
John B. Frisbie & Bezer Simmons
to
Don Victor Castro

DEED

1/10th of Mare Island

Filed for record on the 28th day of July A. D. 1852 at 7 o'clock P. M.

J. HENDLY
Recorder of Sonoma County
By J. H. BREWSTER,
Deputy

And recorded in Book "H" of Sonoma County Records of Land Titles on pp 163, 164 & 165. July 28th A. D. 1852.

J. HENDLY
Recorder
By J. H. BREWSTER
Deputy

Record Fee $4.70

Copy

Know all men by these presents that we John B. Frisbie of Benicia and Bezer Simmons of San Francisco of California for and in consideration of Ten thousand dollars to me paid by Don Victor Castro of Contra Costa in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said Castro, his heirs and assigns, one undivided tenth part (1/10th) of the tract of land situated in California near the Straits of Carquinas in the Bay of San Francisco, at the mouth of Napa Creek, the said Creek bounding the said tract to the northward which said tract of land is called Ysla de la Yegua or Mare Island and the said tract of land this day conveyed by the said Castro to said Frisbie and said Simmons it having been originally decreed to said Castro, by grant, from Juan B. Alvarado, Governor of California, dated the 20th day of May, A. D. 1841.

To Have and to Hold the said one undiv ded tenth part with all the appurtenances unto the said Victor

Castro, his heirs and assigns to him and their own use and behoof forever.

And we the said John B. Frisbie and Bezer Simmons for ourselves, our heirs, executors and administrators, covenant to and with the said Castro his heirs and assigns that we are lawfully seized in fee of the aforegranted premises, that they are free from all incumbrances, that we have good right to sell and convey the same to the said Castro aforesaid, and that we will and our heirs, executors and administrators shall warrant and defend the same to the said Castro, his heirs and assigns against the lawful claims of all persons whatever.

In Witness Whereof I, John B. Frisbie and I, Bezer Simmons acting by my attorney in fact Frederick Billings duly authorized by power of attorney dated Dec. 26th A. D. 1849 recorded archives of San Francisco, Book M. of Deeds, page 70, hereto set our hands and affix our seals at San Francisco this twenty-eighth day of May the year Eighteen hundred and fifty.

[Seal] JOHN B. FRISBIE,
[Seal] BEZER SIMMONS,
by his attorney in fact
FREDERICK BILLINGS.

Executed delivered in presence of
RICHARD CARY PEACHY,
the word "thousand" interlined, 1st page, fourth written line from top before execution.
VON PRUDEN.

J. MAN'L ALLEN.

State of California,
County of San Francisco—ss.

On this 21st day of July, A. D. 1852, before me the subscriber a Notary Public in and for said county personally came Frederick Billings known to me to be the person who as the attorney-in-fact of Bezer Simmons executed the within and acknowledged to me that he executed the same freely and voluntarily as the act and deed of Bezer Simmons by virtue of a power of attorney for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto subscribed my name and affixed my Notarial Seal the day and year last above written.

[Seal] ROYAL H. WALLER,
Notary Public.

State of California,
County of Sonoma—

On this 28th day of July, A. D. 1852 before me the undersigned County Clerk of Sonoma County, personally personally appeared John B. Frisbie to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal of office in City of Sonoma this day and year last above written.

[Seal] JOHN A. BREWSTER
Deputy Clerk of Sonoma
County.

ASSIGNMENT

Simmons Hutchinson Co. and Bezer Simmons
to
Billings, Bolton and Halleck

Copy

This Indenture made this third day of September in the year one thousand 850 between Bezer Simmons & W. H. Stowel copartners in trade & business under the name style & firm of Simmons Hutchinson & Co. of the 1st part and Fred. Billings, James R. Bolton and H. W. Halleck, of the City of San Francisco, parties of the 2d part,

Witnesseth.

That whereas the said copartnership is jointly indebted in sundry considerable sums of money, & by reason of several losses which have recently attended its business operations has become unable to pay and discharge all its liabilities with punctuality in full, and the said parties of the first are now desirous of making a just & fair distribution of their property and effects among their creditors.

Now therefore this Indenture Witnesseth that the said parties of the first in consideration of the premises and the sum of one dollar to each of them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, & sold, released, assigned, transferred & set over and by these presents do grant,

bargain, sell, release, assign, transfer, & set over, unto the said parties of the second part & to their heirs & assigns forever, all & singular, the lands, tenements, & hereditaments, situate lying & being within the State of California, and also all the goods, chattels, steamboats, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, books of accounts, evidences of debt, & property of every name, nature & description whatsoever of the said Bezer Simmons & William H. Stowel, the parties of the 1st part. More particularly situated & described in the schedule hereto annexed marked A and made part of this Indenture.

To Have & to Hold the same & every part & parcel thereof with the appurtenances to the said parties of the second part their heirs & assigns forever.

In trust nevertheless, and to and for the following uses, interests & purposes that is to say that the said parties of the second part shall take possession of all & singular of the lands, tenements and hereditaments & all other property hereby assigned or intended so to be, and sell & dispose of the same, either at public or private sale, to such person or persons, for such prices & on such terms & conditions, and either for cash or for credit, as in their judgment may appear best, and most for the interest of the parties concerned, & convert the same into money, & also to collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims,

demands, and choses in action, or so much thereof as may prove collectable—and thereupon to execute, acknowledge and deliver good & sufficient deeds, bills of sale, releases and all other instruments of conveyance that may be necessary & proper to effect a sale & transfer of any & all the estates, property & effects hereby conveyed or intended so to be—and by and with the proceeds of such sales & collections, the said party of the second part shall first pay & disburse all the just, reasonable & usual expenses, costs, charges, & commissions, of making & conveying into effect the assignment and the objects thereof—and the residue of the proceeds of such sales & collections shall be considered as the nett avails or proceeds of the property & effects hereby assigned.

And first, by & with the said proceeds, the said parties of the second part shall pay & discharge in full, the following sums of money to whom they are respectively due—That is to say to George H. Howard $3000, to Flint Peabody & Co. $3000, to Wells & Co. $2000, with legal interest from the date of this assignment.

The said debts are mentioned in Schedule B.

And secondly, by and with the residue and remainder of said nett proceeds, if any shall remain after the payment in full of the debts & liabilities mentioned in Schedule B the said parties of the second part shall pay and discharge all sums of money due upon deposits made with the firm of Simmons Hutchinson & Co. when said firm was composed of Bezer Simmons, William H. Stowel, John

F. Pope & Titus Hutchinson, as well as when composed of the said parties of the first part, provided that said deposits were made without agreement between the depositors & the said firm of Simmons Hutchinson & Co. that the money or gold dust should bear interest, and also whatever sums of money shall be due or become due to the Steamer Gold Hunter. The above mentioned debts which are set forth in Schedule C shall be paid in full, if such remainder shall prove sufficient for that purpose— and if insufficient then the parties of the second part shall apply such remainder to the payment & liquidation of said debts & demands mentioned in Schedule C pro rata, share and share alike, according to their respective amounts as far as such remainder will extend for that purpose and in the foregoing class of creditors shall be included the firm of G. S. Robins & Son of the City of New York, Bankers, the amount of indebtedness to whom is stated in Schedule C.

And thirdly, by and with the rest, residue and remainder of said nett proceeds if any shall remain. After paying & discharging the debts & demands aforesaid, the said parties of the second part shall pay & discharge all the other copartnership debts demands & liabilities whatsoever now existing, whether due or hereafter to become due against the firm of Simmons Hutchinson & Co. when composed of the said Bezer Simmons, Titus Hutchinson, John F. Pope and William H. Stowel partners, as well as when the said firm was composed of the parties

of the first part, partners therein provided such remainder shall prove sufficient for that purpose and if insufficient then said parties of the second part shall apply such remainder to the payment and liquidation of such debts & demands pro rata, share and share alike, according to their respective amounts as far as such remainder will extend for that purpose.

And lastly the said parties of the second part shall return the surplus if any after paying the debts & demands aforesaid to the said parties of the first part, their executors, administrators, or assigns, and for the better execution of these presents; and of the several trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute, and appoint the said Frederick Billings, their and each of their true and lawful attorney irrevocable with power of substitution and revocation, with full power and authority in the name of the said parties of the first part, & their and each of them legal representatives—or otherwise, to do, transact & perform all acts, deeds, matters, and things, in the full execution of these powers.

And the said parties of the first part for themselves & their & each of their heirs, executors & administrators covenant & agree to & with the said parties of the second part that they will when requested make or cause to be made such further assignments deeds and conveyances as shall be necessary to carry into full and complete effect the intentions of the parties to these presents.

It is understood that this deed of assignment is a deed of trust for the benefit of the creditors of the present firm of Simmons Hutchinson & Co. composed of the parties of the first part, and also the creditors of the firm of Simmons Hutchinson & Co. as it was formerly constituted when Titus Hutchinson and John F. Pope, were also partners, aside from the preference hereinbefore given to certain creditors; the creditors, of the two firms doing business under the same name being treated alike.

In testimony whereof the parties of the first part, have hereunto set their hands and affixed their seals, this third day of September 1850.

(Signed) B. SIMMONS [Seal]
(Signed) WM. H. STOWELL [Seal]

Signed Sealed and delivered in presence of—the words "creditors of the" having been interlined on the last line of the fifth page before the execution hereof.

Signed and delivered in the presence of
A. C. PEACHY
C. T. EMMETT.

State of California,
County of San Francisco

At San Francisco on this the third day of September A. D. 1850 personally appeared before me a Notary Public, within and for the County, Bezer Simmons and W. H. Stowell, well known to me to be the parties described in and who executed the

foregoing instrument, and each acknowledged that he executed the same freely and voluntarily and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal of office the day and year above written.

[Seal] C. TEMPLE EMMET
Notary Public

DEEDS

Fred'k. Billings and other assignees
to
George W. P. Bissell

Filed for record on this 17th day of July, A. D. 1852, at 9 o'clock p. m.

J. HENDLY
Recorder of Sonoma County

By J. A. BREWSTER.
Deputy

And recorded in Book H of Land Title Records of Sonoma County on pp. 147 & 148 on this July 19, A. D. 1852.

JOHN HENDLY
Recorder

By J. A. BREWSTER
Deputy

Fee $4.70 Pd.

Copy

Know All Men by These Presents, that we Frederick Billings, James R. Bolton, and Henry W. Halleck, all of the City of San Francisco in the State of California, assignees of the real estate and personal property of the late firm of Simmons Hutchinson & Company of the said City of San Francisco composed of Bezer Simmons and William H. Stowel—by virtue of a certain deed duly executed, dated the 3d day of September, A. D. 1850, recorded in the office of the Recorder of the County of San Francisco, in Book No. 1, Deeds of Trust page 32. Also assignees of the Real Estate and personal property of the late Bezer Simmons, of said San Francisco, by virtue of a certain deed duly executed dated the 3d day of September, 1852, recorded in the office of the Recorder of the County of San Francisco, in Book No. 1, Deeds of Trust, page 29, that we as such assignees and acting under and by virtue of said deeds, parties of the first part, in consideration of twenty-five hundred dollars, to us in hand paid, the receipt whereof is hereby acknowledged, by G. W. P. Bissell, of said San Francisco party of the second part, have, granted, bargained, sold and conveyed, and by these presents do, grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, All our right, title, interest, and claim, of in and to the undivided one-half part of Sixty Seven Eightieths (67/80) of Mare Island, so called, situated in the Bay of San Pablo—which said Island was provisionally granted by

Governor Jimeno on the 31st day of October, 1840 and afterwards on the 20th day of May, 1841, granted by Governor Alvarado to Victor Castro—and by said Castro, conveyed to Frisbie, and Simmons on the 28th day of May, 1850 and the interest of said Simmons conveyed to said assignees as aforesaid.

To Have and To Hold the said mentioned premises with all the appurtenances unto the said party of the second part his heirs and assigns, to his and their use and behoof forever.

In Witness Whereof we the parties of the first part hereto set our hands and seals this the first day of July, the year of our Lord, one thousand eight hundred and fifty-two at San Francisco aforesaid.

FRED'K BILLINGS
Assignee of Bezer Simmons
& Assignee of Simmons
Hutchinson & Co.

H. W. HALLECK,
Assignee of Bezer Simmons
& Assignee of Simmons
Hutchinson & Co.

JAMES R. BOLTON,
Assignee of Bezer Simmons
& Assignee of Simmons
Hutchinson & Co.

Executed and delivered in presence of
R. H. WALLER.

State of California
County of San Francisco—ss.

On this 16th day of July A. D. 1852 personally appeared before me the subscriber, a Notary Public in and for said County, Frederick Billings, H. W. Halleck, and James R. Bolton known to me to be the individuals described in and who as the assignees of Bezer Simmons and Simmons Hutchinson & Co. executed the foregoing conveyance and severally acknowledged to me that they executed the same as such assignees freely & voluntarily for the uses and purposes.

In testimony whereof I have hereunto subscribed my name and Seal of office on the day & year last above mentioned.

[Seal] ROYAL H. WALLER,
Notary Public.

[Seal]
[Seal]
[Seal]

DEED

John B. Frisbie
to
Geo. W. P. Bissell

Filed for record on this the 19th day of July A. D. 1852 at 8 o'clock A. M.

J. HENDLEY
Recorder of Sonoma County
By J. A. BREWSTER
Deputy

And recorded in Book "H" of Records of Land Titles in Sonoma County at pp. 148 & 149 on this July 19 A. D. 1852.

J. HENDLEY
Recorder

By J. A. BREWSTER
Deputy

Record fee $3.90.

This Indenture made and executed this sixteenth day of July Eighteen hundred and fifty-two by and between John B. Frisbie of the City and County of Sonoma and State of California of the first part, and G. W. P. Bissell of the City and County of San Francisco and State aforesaid of the second part, Witneseth That the said party of the first part for and in consideration of the sum of four thousand dollars lawful money of the United States of America to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part his heirs executors, administrators and assigns all the right title and interest of the said party of the first part of, in and to that certain piece of property situate in the County of Sonoma and State of California known as Mare Island, the said interest being one undivided fourth of said Island, less one tenth and one sixteenth of the whole. To Have and to Hold all

and singular the above described premises together with the appurtenances unto the said party of the second part his heirs and assigns forever. In Witness Whereof the said part of the first part has hereunto set his hand and seal the day and year first above written.

[Seal] JOHN B. FRISBIE.

Sealed and delivered in the presence of

M. J. VALLEJO

MARTIN E. COOKE

State of California,
County of Sonoma—ss.

On this sixteenth day of July Eighteen hundred and fifty-two personally appearing before me the within named John B. Frisbie, to me known to be the person named and described in the within Instrument and who executed the same, and acknowledged that he had executed the same voluntarily as his own free act and deed for the uses and purposes therein mentioned. In Witness Whereof I have hereunto set my hand and private seal having as yet no official seal on the day and year above written.

[Seal] MARTIN E. COOKE

Notary Public.

Copy

Don Victor Castro

to

George W. P. Bissell

DEED

1/10th Mare Island

Filed for record on the 28th day of July A. D 1852 at 7 o'clock p.m.

J. HENDLY
Recorder of Deeds
Sonoma Co.

By J. A. BREWSTER
Deputy

And recorded in Book "H" of Sonoma County records of Land Titles on pp. 165, 166 & 167 July 28 A. D. 1852.

J. HENDLY
Recorder

By J. A. BREWSTER
Deputy

Record fees $5.10.

S. W. MOORE (Illegible)
Notary Public

Know all me by these presents that I Victor Castro of the township of Contra Costa and County of Contra Costa, in the State of California for and

in consideration of the sum of eighteen hundred dollars to me in hand paid by George W. P. Bissell of the City of San Francisco and State aforesaid at or before the execution of this deed and delivery thereof the receipt whereof I do hereby acknowledge, have granted bargained sold and conveyed and by these presents do grant bargain sell and convey unto the said George W. P. Bissell his heirs and assigns forever all my right title and interest in and to the one undivided tenth part (1/10th) of the tract of land situate in the State of California near the Straits of Carquinez in the Bay of San Francisco at the mouth of Napa Creek, the said Creek bounding the said tract to the Northward which said tract of land is called "Isla de Yegua" or Mare Island, and being the same tract of land originally granted to said Castro by Juan B. Alvarado Governor of California by grant bearing date the 20th day of May A. D. 1841 and by the said Castro conveyed to John B. Frisbie and Bezer Simmons by deed bearing date the 28th day of May A. D. 1850, and the above one tenth part of said land reconveyed by the said Frisbie & Simmons to the said Castro by deed bearing date the 28th day of May A. D. 1850.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said George W. P. Bissell his heirs and assigns to his and their own use and behoof forever. And I the said Victor Castro for myself and my heirs executors and administrators do covenant to and with the said George W. P. Bissell his heirs and assigns that I

am lawfully seized in fee of the afore granted premises that they are free from all encumbrances, that I have good right to sell and convey the same to the said George W. P. Bissell his heirs & assigns against the lawful claims and demands of all persons, and failing so to do, I the said Victor Castro for myself and my heirs executors and administrators do covenant with the said George W. P. Bissell his heirs and assigns in such sum as the said George W. P. Bissell his heirs and assigns may sustain, not exceeding the sum mentioned in the consideration of these presents.

In Witness Whereof I the said Victor Castro have hereunto set my hand and seal this twentieth day of July in the year of our Lord one thousand eight hundred and fifty two.

(Signed) VICTOR CASTRO [Seal]

Signed Sealed and delivered in presence of

CHAS. H. W. COOK.

S. W. MOORE.

State of California,
City and County of San Francisco—ss.

On the 20th day of July A. D. 1852 before me a Notary Public in and for the City and County of San Francisco State aforesaid, personally appeared Don Victor Castro to me well known to be the person described in and who executed the foregoing conveyance and acknowledged that he executed the

same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year last above mentioned.

[Seal] SAMUEL W. MOORE
Notary Public

Copy

This Indenture, made and executed this sixteenth day of July Eighteen hundred and fifty-two by and between John B. Frisbie of the City and County of Sonoma and State of California, of the first part and G. W. P. Bissell of the City and County of San Francisco and State aforesaid of the second part Witnesseth That the said party of the first part for and in consideration of the sum of four thousand dollars lawful money of the United States of America to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs, executors, administrators and assigns, all the right title and interest of the said party of the first part of in and into that certain piece of property situated in the County of Sonoma and State of California known as "Mare Island", the said interest being one undivided fourth of said Island, less one tenth and one sixteenth, of the whole. To Have and to Hold all and singular the

above prescribed premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) JOHN B. FRISBIE [Seal]
Sealed and delivered in the presence of

M. J. VALLEJO
MARTIN E. COOKE

State of California,
County of Sonoma.

On this sixteenth day of July Eighteen hundred and fifty-two, personally appeared before me, the within named John B. Frisbie to me known to be the person named and described in the within Instrument and who executed the same voluntarily as his own free act and deed and for the uses and purposes therein mentioned.

In Witness Thereof I have hereunto set my hand and private seal having as yet no official seal on the day and year above written.

[Seal] MARTIN E. COOKE
Notary Public

DEED

John B. Frisbie
to
G. W. P. Bissell

Filed for record on this 19th day of July A. D. 1852 at 8 o'clock A. M.

J. HENDLY
Recorder of Sonoma County
By J. A. BREWSTER
Deputy

And Recorded in Book "H" of Records of Land Titles in Sonoma County on pp. 148 and 149 on this July 19th A. D. 1852.

J. HENDLY
Recorder
By J. A. BREWSTER

Record Fee $3.90.

Wm. H. Aspinwall
to
U. S. A.

BOND & LETTER
Copy of
Mare Island

Know All Men by These Presents: that we William H. Aspinwall and Samuel W. Comstock of the City of New York Merchants are held and firmly bound unto the United States of America in the

penal sum of Two Hundred Thousand Dollars lawful money of the United States to be paid to the said United States or the Secretary of the Navy thereof For which payment well and truly to be made we bind ourselves, our heirs executors, administrators and assigns jointly and severally by these presents.

In Testimony Whereof we have hereunto signed our names and affixed our seals in the City of New York on this twenty eighth day of February in the year Eighteen hundred and fifty three.

Whereas the said William H. Aspinwall in his own right and as Attorney of George W. P. Bissell and also as Attorney for Mary S. McArthur did on the fifteenth day of December eighteen hundred and fifty two enter into a Contract with the Hon. John P. Kennedy, Secretary of the Navy, in conformity with the terms and stipulations relating thereto, expressed in a letter of the said Secretary of the Navy dated on the tenth day of December, Eighteen hundred and fifty two which letter and the assent of the said William H. Aspinwall are on the files of the Navy Department, whereby the said William H. Aspinwall acting for himself and the other parties hereinabove referred to did covenant and agree to sell to the said United States the tract of land in California in the Bay of San Pablo known by the name of Mare Island and did thereby bind himself and all other parties interested in the ownership of the same to convey to the United States by a good and suffi-

cient deed or Deeds the entire and absolute fee simple Estate in the said tract of land known as Mare Island aforesaid which conveyance it was stipulated was to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall as a full consideration for said purchase whatever portion of the appropriation of one hundred thousand dollars appropriated by Act of Congress of the 31st August 1852 should remain as the unexpended balance thereof after all the expenses of Commission for the selection of a site for a Navy Yard in California and the performance of the duties assigned to the Board of Officers charged with that selection should have been fully paid. And which said Contract or agreement contains also other stipulations which the Parties thereto were to observe all of which will more fully appear by reference thereto the same being appended to this Bond for the interpretation of the same and as a part thereof.

And Whereas the said William H. Aspinwall acting in his own right and as attorney for the said George W. P. Bissell has together with Mary S. McArthur executed a Deed to the United States in pursuance of the above Contract and for the conveyance of the said tract called Mare Island and its appurtenances with covenants for further assurance of the same should be necessary which deed is dated on the fourth day of January Eighteen hundred and fifty three and is deposited with the Secretary of the Navy.

Now the condition of the above written obligation is such that if the said William H. Aspinwall shall well and truly observe perform and fulfil the obligations of the said Contract hereinabove referred to and more particularly set forth in the copy thereof hereto appended and shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said William H. Aspinwall, and shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter be successfully established against the title proposed to be conveyed by said William H. Aspinwall and those with and through whom he claims to hold the same by which the full and perfect title of the United States as derived by the conveyance of the said William H. Aspinwall and the parties represented by him may be in anywise impaired diminished or destroyed and if the said William H. Aspinwall and those whom he represents so far as he and they are bound thereto by the covenants of the deed of conveyance herein above referred to and the contract hereinbefore recited procure and executed such further conveyance by Deed or Deeds as may become necessary for the complete establishment and security of the title in the United States in conformity with the true

interest of said contract And also if the said George W. P. Bissell's Power of Attorney to the said William H. Aspinwall shall have been revoked by any matter of fact or of law or if the said George W. P. Bissell shall prior to the date when the Deed herein above referred to or any substitute for the said Deed shall be sent to California and be received there to be registered and recorded (the same to be sent forward without unreasonable delay) have disposed of or encumbered the said lands so that the title to the United States therein may be impaired in which event if all such incumbrances or acts tending to impair the said title be not forthwith removed or defeated and by reason of such failure to remove or defeat them, the Secretary of the Navy should think fit to reconvey or relinquish the said land to the Grantors named in the deed herein above mentioned their heirs and assigns and the said William H. Aspinwall his heirs executors administrators or assigns in that case should refund and repay to the United States the amount which shall have been paid to him on the consideration of the said purchase with interest at the rate of six per cent on the same then upon this and all other contingencies hereinbefore expressed this obligation shall then become void but otherwise it shall stand and remain in full force and virtue according to its tenor and effect.

WM. H. ASPINWALL (L.S.)
SAML W. COMSTOCK (L.S.)

Signed, Sealed and Delivered in presence of:
WM. MACREA.

Navy Department
December 10th 1853

Sir

I have received Mr. Wm. H. Aspinwalls letter of the 4th inst. and yours of the 7th.

Mr. Aspinwall being as you inform me fully authorized to act in behalf of all the owners of Mare Island in California, for the sale of that property to the United States and to make an absolute engagement and Contract for the Sale parties having any interest in this property, I take this occasion to say to you that I am now ready in pursuance of the authority given to me by the 3d Section of the Act of Congress of August 31, 1852 entitled "An Act making appropriations for the Naval Service for the year ending the 30th. of June 1853." Chap CIX of the Statutes at large 1st Sess: 32 Con to conclude a contract for the purchase of Mare Island as recently surveyed and reported by a Board of Officers sent to California for the purpose of selecting a site for a Navy Yard which Board have returned and made their report to this Department.

I understand the basis of a contract proposed by Mr. Aspinwall and by yourself with his authority to be as follows. That Mr. Aspinwall acting for himself and all other parties interested in the ownership of Mare Island, or claiming any interest in the same proposes on their behalf and bind them and himself to convey to the United States

by a good and sufficient deed or the entire and absolute fee simple estate in that tract of land known as Mare Island in California including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, giving a quit claim and full transfer of all the interest of the proprietors in the same and all privileges, rights or claims to the waters harbors and creeks supposed or claimed to belong to the said tract known as Mare Island.

That this conveyance is to be made in consideration of an agreement on the part of the United States to the said William H. Aspinwall as a full consideration for the purchase, whatever portion of the appropriation of one hundred thousand dollars appropriated by the act of Congress herein above referred to, may remain as the unexpended balance of that appropriation after all the expenses of the Commission for the selection of the site for Navy Yard and the performance of the duties assigned to the Board of Officers charged with that selection shall have been fully paid. That this sum shall be ascertained as soon as practicable by auditing the accounts of expenses of the Commission and deducting the amount at which they may be stated from the whole amount of the appropriation and upon receiving the proper deeds or deeds for a full and perfect conveyance of the title to the tract of land above mentioned with all its appurtenances and privileges made and

executed to the satisfaction of this Department then the amount ascertained as above to be paid to the said William H. Aspinwall.

And it is further proposed as a part of this agreement on behalf of the owners that the United States shall permit a ferry to be established with the shore on the opposite side of the Straits of Carquenaz, with a suitable reservation of five hundred feet square on Mare Island for a landing, which proposition is modified at my instance to be received as follows:

That the United States shall agree to allow a convenient ferry for intercourse with the opposite shore with such reservation of land for a landing place on Mare Island as government may find convenient but this ferry always to be so far under the control of the government as to compel its removal to any part of the public property which may be designated by the Navy Department for the convenience or advantage of the government, whenever or as often as it may become necessary with reference to the security or advantage of the public interest in the operations which may be conducted on Mare Island, and also, if need be, to forbid any communication between the tract called Mare Island and the opposite but upon such conditions as the government may think it necessary to prescribe.

This control being deemed necessary to be reserved to the government with a view to the good order and police regulations of the Navy Yard which it is the design of the government to

establish at this place. It being also understood that no building of any kind shall be erected on Mare Island upon the landing place of any ferry which may be permitted without the consent of the Navy Department and that any building or structure which may be erected with such consent shall be subject to removal at any time by the order or authority of the Navy Department.

I am willing to accept the proposition of Mr. Aspinwall as above stated with the modifications herein made as soon as he shall apprise me of his consent to the sale on these terms which he may do by appending that consent in a note to this letter and returning the same to me.

I am respectfully,
Your obed't Srv't,
JOHN P. KENNEDY

Wm. H. Davidge, Esq.
Agent of W. H. Aspinwall,
New York.

I assent fully and unconditionally to the foregoing on behalf of the several owners of Mare Island.

WM. H. ASPINWALL

New York, Dec. 15, 1842.

The above copy reaffirmed by me as agent of Wm. H. Aspinwall this 1st March, 1853.

WM. H. DAVIDGE

State of California,
County of Solano

The foregoing instruments of writing were received by me for record on the 18th day of April 1853 at 9 o'clock A. M.

JOSEPH P. VAUGHN
County Recorder

State of California,
County of Solano

I certify the foregoing to be true copies of instruments of writing of record in my office in Book H, pages 13, 14, 15, 16, 17 & 18.

Witness my hand and seal of the County Recorder's Office of said County this 9th day of April A. D., 1859.

WM. J. HOOTON
County Recorder of
said County
[Seal] By PERRY WILLIAMS
Dep. Recorder

To All Whom these Presents Shall Come

George W. P. Bissell of the City of San Francisco in California, William H. Aspinwall of the City of New York in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland Send Greeting, Whereas the said parties as tenants in common are owners and proprietors

of a tract of land usually known as Mare Island in California now recently surveyed and agreed to be purchased for the purpose of a Navy Yard for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interest and proportions of the said owners respectively in the said Island are as follows that is to say of the said George W. P. Bissell fifty eight eightieths parts and one fourth of an eightieth part (the whole being divided into equal eightieth parts) the said William H. Aspinwall sixteen and three fourths eightieths parts and the said Mary S. McArthur as sole devisee of William P. McArthur deceased of the remaining five eightieth parts; and they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed paid to them severally and respectively according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now These Presents Witness that the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of eighty-three thousand four hundred and ninety one dollars to them paid in proportion to their said interests respectively on behalf of the United States of America the receipt of which is hereby acknowledged have granted bargained and sold released and quit claimed and by these presents do grant bargain sell, release and quit claim unto the United States all that tract of land and island called and

known as Mare Island in the Bay of San Pablo as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard then including all the tule or low land and marsh belonging to the same or which has ever been separated or claimed to belong to the same and all the waters harbours bays creeks and other waters privileges benefits advantages tenements hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed) with the reversion and reversions, remainder and remainders, rents issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever with the mutual agreement that the said Grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek the location of which ferry on the shore of the mainland shall be where the Grantors their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officers at the time representing the Navy department at San Francisco for the landing of which ferry on the said Island to be selected and located by the said grantors their heirs and assigns with such assent and approval as last aforesaid. However ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States. That the said ferry and landing place, shall at all times for the purpose of police and the regu-

lations of persons and things in the Navy Yard be subject to such orders as the Secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island and also that no building of any kind shall be erected on the landing place without such consent as aforesaid and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States in reference to the said public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for the purpose of such landing place and the ferry privilege shall apply to such new landing places and all other terms hereof in relation thereto and so on from time to time as changes in this respect may be found necessary on the part of the United States and on every such change it shall be lawful for said grantors their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors their heirs and assigns to conform to such removal with all convenient speed.

And the said grantors for themselves according to their several interests aforesaid and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns

that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the Law for the more perfect assurance unto them of the premises hereby purporting to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, one thousand eight hundred and fifty three.

G. W. P. BISSELL [L.S.]
& WM. H. ASPINWALL [L.S.]
Atty
WM. H. ASPINWALL [L.S.]
MARY S. McARTHUR [L.S.]

Sealed and delivered in the presence of
As to the signature of

G. W. Bissell
W. H. Aspinwall
Atty. and
William H. Aspinwall

WM. MACREA
I. C. LANUM
J. D. PRATT
JNO. D. YOUNG

As to Mary S. Arthur

State of New York .
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California to take the acknowledgments and proof of deeds and other instruments of writing under seal to be used or recorded in same State of California and to administer oaths and affirmations do hereby certify that on the day of the date hereof before me personally came William H. Aspinwall in his individual capacity and as the attorney in fact of George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell one of the parties therein described by virtue of a power of attorney duly executed *by the said* for the purposes therein mentioned.

And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed. ..

Given under my hand and official Seal the fourth day of January in the year of our Lord one thousand eight hundred and fifty three.

[L.S.] JOSEPH C. LAURENCE
Commissioner of the State of California in and for the State of New York, 68 Water Street, New York.

State of Maryland
Baltimore City & County—ss.

On this fifth day of January A. D. 1853 before me, Jabez D. Pratt, a Commissioner appointed by the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds &c personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed & sealed the same before me acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day & year last aforesaid.

JABEZ D. PRATT
Comr. of California.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853 at 9 o'clock A. M.

JOS. P. VAUGHN
County Recorder

State of California,
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of Record in my office in

Book H, pages 10, 11, 12 & 13 of Solano County Records.

Witness my hand and seal of the County Recorder's office of said County this the 9th day of April A. D. 1857.

[Seal] WILLIAM L. HOOTON
County Recorder of said County
By PERRY WILLIAMS
Dep. Recorder

REPORT OF G. *D.* BATES, LATE U. S. DISTRICT ATTORNEY, ON THE TITLE TO MARE ISLAND

Copy

U. S. District Attorneys Office
San Francisco, July 30, 1852

I George C. Bates late United States district atty for the district of Michigan and at present in the Office of Calhoum Benham, United States District Atty for the Northern District of California do hereby certify that I have carefully examined the title of George W. P. Bissel to Mare Island in California and that I find that the title to said Island is in said George W. P. Bissel free and clear except the one sixteenth which belongs to the estate of William P. McArthur as appears by the copies of the several conveyances herewith forwarded and I do further certify that said title (illegible) clear from all incumbrances or liens and that the same is vested in said George W. P. Bissel and the one

sixteenth in William P. McArthur and that I have made this examination because the district attorney was engaged in court and that it was done at the request of Commodore Sloat on behalf of the Commission to locate a Naval Depot.

(signed) GEO. C. BATES

Late U. S. District atty now in the office of Calhoun Benham U. S. District Atty for Northern district of California

I further state that in an informal and unofficial manner I have conversed with Gen'l James Wilson who states that according to the principles settled by the board of Land Commissioners that the Grant to De Castro is valid and clear.

(signed) GEO. C. BATES

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7522

JAMES E. O'DONNELL, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO COPY OF PLAINTIFF'S EXHIBIT "C".

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing one hundred and fifty-four pages, numbered from and including 1 to and including 154, to be a full, true and correct photographic copy of the record in the District Court of the United States for the Northern District of California, in a cause there entitled United States of America, plaintiff, vs. George W. P. Bissel and William H. Aspinwall, and there numbered 311, N.D., as the originals thereof, heretofore certified to my office as Plaintiff's Exhibit "C" in the above-entitled O'Donnell cause, remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the

State of California, this 7th day of June, A. D. 1937.

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: U. S. District Court, S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit D-2. Filed June 8, '37. W. B. Maling, Clerk.

U. S. EXHIBIT D-3

1857

February 28 At a Stated Term of the District Court of the United States of America for the Northern District of California held at the City of San Francisco on Saturday, February 28th, 1857.

Present,

Hon. Ogden Hoffman, District Judge.

The United States — No. 361.
— vs —
Mary S. Bennett — Decree of Confirmation entered.

Court adjourned until Monday [illegible]

[illegible] At a Stated Term of the District Court of the United States of America for the Northern District of California held at the City of San Francisco on Monday, March 2d, 1857.

Present, Hon. [illegible]
Hon. Ogden Hoffman, District Judge.

Milton [illegible] — No. [illegible]
— vs —
The United States — Order entered allowing six weeks time to close proofs and submit cause.

The United States — No. [illegible] By reading and filing petition and by
— vs — Consent of the counsel for both parties, order entered
F. F. Teschmacher et al. — allowing the decree [illegible] to be modified.

Antonio Zabolla — No. 213.
— vs —
The United States — Order entered allowing three weeks time to close proofs and submit cause.

Edward A. Breed — No. 390.
— vs — et als.
The United States — Motion on affidavit to restore cause to the Docket was made and taken under advisement.

The United States — No. 361.
— vs —
Mary S. Bennett — Decree of Confirmation entered.

Court adjourned until Monday next at [illegible]

2. At a Stated Term of the District Court of the United States of America for the Northern District of California held at the City of San Francisco on Monday March 2d 1857.
Present Hon. M. [illegible] McAlister [illegible]
Hon. Ogden Hoffman [illegible]

Melton Little — No. [illegible]
— vs —
The United States — Order entered allowing [illegible] time to close proofs and submit cause.

The United States — No. [illegible] On reading and filing petition and by consent of the counsel for both parties order entered allowing the decree [illegible] to be modified.
— vs —
H. F. Teschmacher et al.

Antonio Zabolla — No. 213.
— vs —
The United States — Order entered allowing three [illegible] time to close proofs and submit cause.

Edward A. Breed — No. 390.
— vs — et als.
The United States — Motion on affidavit to restore cause to the Docket was made and taken under advisement.

The United States — No. 424.
— vs —
José P. Limentour — On motion of the United States District Attorney. It is ordered by the Court that Sidney Johnson Esq. be paid by the United States Marshal the Sum of ~~[illegible]~~ One hundred and thirty dollars for Thirteen days Services as Interpreter in ~~[illegible]~~ interpreting from the [illegible] to ~~[illegible]~~ evidence of [illegible] taken in this case before the Hon. Johnson Esq. U. S. Commissioner.

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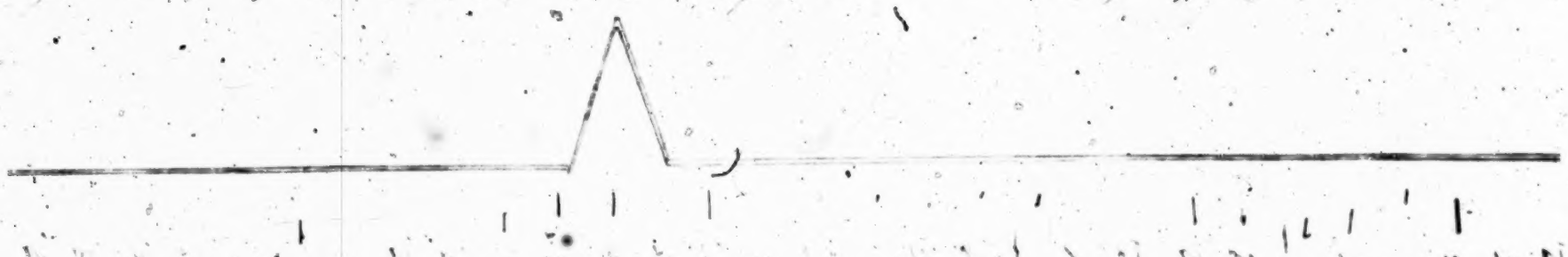


Certified Copy

United States of America,
Northern District of California—ss.

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full photostatic copy of the original pages 23 and 24, Volume No. 3, Minutes U. S. District Court, Northern District of California, for March 2nd, 1857, showing the order entered in case No. 311, N. D. United States vs. Bissell & Aspinwall, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif. this 19th day of April, A. D. 1937.

[Seal] WALTER B. MALING,
Clerk.
By C. W. CALBREATH,
Deputy Clerk.

[Endorsed]: U. S. District Court. S. F. U. S. vs. Stewart. No. 2685. U. S. Exhibit D-3. Filed June 8, '37. W. B. Maling, Clerk.

No. 9507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, January 16, 1941.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. Oscar A. Provost, Special Assistant to the Attorney General, counsel for appellant, and by Messrs. J. M. Mannon, Jr., and Robert L. Lipman, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 30, 1941.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF DECREE

By direction of the Court, ordered that the typewritten opinion and concurring opinion and dissenting-in-part opinion this day rendered by this court

in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion and concurring opinion rendered.

[Title of Circuit Court of Appeals.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: Denman, Mathews and Healy,
Circuit Judges.

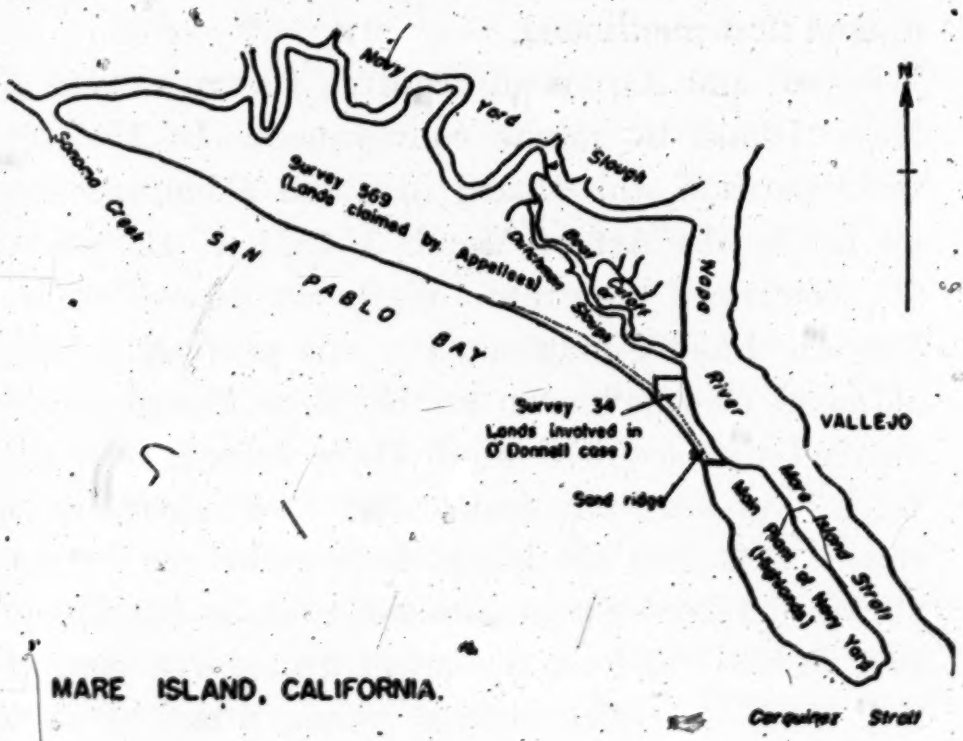
Healy, Circuit Judge:

In this action the United States seeks to quiet its title to a large area of tule or marsh land claimed to be a part of Mare Island in San Pablo Bay and to have been acquired by purchase from the grantees of Victor Castro, to whom the island was granted by the Mexican Governor Alvarado in 1841. Appellees, defendants below, claim title to the land by mesne conveyances from a patentee of the State of California.

The suit—a companion case to United States v. O'Donnell, 303 U. S. 501—presents the final chapter in a century-old controversy concerning the extent and validity of the Castro grant. The O'Donnell case set at rest doubts of the validity of the grant and of the decree confirming it. That deci-

sion, however, involved a different tract and left open to inquiry a number of questions now presented.

Mare Island lies close to the mainland from which it is separated by navigable waters. For the purpose of illustration we append a drawing of the area.



MARE ISLAND, CALIFORNIA.

At the southeasterly extremity, between Mare Island and Carquinez Straits on the east and south and San Pablo Bay on the west, is an area of high land approximately 900 acres in extent upon which the plant of Mare Island Navy Yard is in the main located. Extending northwesterly from this upland there was, at the time of the grant, a narrow neck of swamp land which has since been widened somewhat by filling and reclamation. This isthmus,

known as Survey No. 34, was the tract involved in the O'Donnell suit and was there determined to belong to the United States. Northwesterly of Survey No. 34, stretching out fanwise, is the much larger tract of swamp land known as Survey No. 569—the lands in suit. Appellees contend that Mare Island comprises only the relatively small area of upland first mentioned.

Bissell and Aspinwall acquired Castro's grant of Mare Island by mesne conveyances. In 1855, on their petition, the Board of Land Commissioners set up by the Act of March 3, 1851, c. 41, 9 Stat. 631, confirmed the grant. While the proceeding before the Land Commissioners was pending, a body of naval officers known as the Sloat Board recommended the acquisition of Mare Island as a site for a navy yard and depot. The Sloat Board in its report described the island as bounded on the east by Mare Island Straits, on the west by the Bay of San Pablo, "and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma." The owners in their negotiations with the naval board stated that the island contained about 900 acres of high or dry land and about 1300 acres of tule or low ground.

In December, 1852 the Secretary of the Navy made to the owners an offer to purchase "that tract of land known as Mare Island in California including all the tide or low land and marsh belonging to the same or . . . reputed or claimed to belong to the same . . . as recently surveyed and re-

ported by a Board of Officers sent to California for the purpose of selecting a site for a Navy Yard. . . .'' Accepting the offer, Bissell and his associates on Jan. 4, 1853 gave their deed of the island, and later executed a bond indemnifying the United States against possible failure of their title. The deed described the island substantially in the terms of the offer to purchase. On February 11, 1853, by executive order of the President, Mare Island was reserved ''together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island . . .'' for public uses. In 1854 the state of California formally consented to the purchase, and also relinquished its title and interest to ''the overflowed beach, or swamp lands'', on the eastern shore from the southern end to a parallel intersecting the northern point of the highlands ''and extending into the waters or straits, washing the eastern shore of said highlands to ship channel''. By the same act the state ceded jurisdiction to the United States over both the highland and the overflowed portions of the eastern shore thereof. Cal. Stats., 1854, 1855, pp. 48-49.

In 1856 the lands in the neck (Survey No. 34) were surveyed by a deputy county surveyor as swamp and overflowed lands supposedly owned by the state under the Swamp Land Act of September 28, 1850, c. 84, 9 Stats. 519. The state thereafter issued its patent to Darlington. In 1869, at the request of one Hinckley, the lands in suit were sur-

veyed as Survey No. 569 by the county surveyor of Solano county. In 1874 the state issued its patent for the latter tract to one Pearson, assignee of Hinckley.[1] In 1883 Pearson's successors brought an action in ejectment against the Commandant of the navy yard to obtain possession of the lands in Survey No. 569. In that suit the Commandant was represented by the United States attorney and a special assistant appointed by the Attorney General. The United States was not a party. The evidence then produced showed that the lands were below the line of ordinary high tide, and Justice Field, sitting in circuit with Judge Sawyer, accordingly held that they were not included within the Castro grant. Judgment in ejectment was entered against the Commandant. San Francisco Sav. Union v. Irwin, 28 Fed. 708. The judgment was affirmed. 136 U. S. 578 (1890).

In 1896 one Cross went into possession of the lands embraced in Survey No. 569 and asked the then Commandant for permission to employ a navy yard surveyor to locate the boundary, stating that he, Cross, was about to begin the reclamation of his land. The Commandant agreed, expressing the wish "that the boundary line once established may be done so accurately that no objection will ever be raised by either of the parties interested therein." In the years 1896, 1910 and 1924 the Department of the Interior issued patents on behalf of the

[1]Appellees claim under Pearson.

United States to the state of California covering all the lands embraced in Survey No. 569, as swamp lands.[2] In 1913, in compliance with a state statute (Cal. Stats., 1897, pp. 51-52), a map of Mare Island Naval Reservation was filed with the recorder of Solano county designating only the high area and the portion embraced in Survey No. 34. In December, 1914 the navy yard officials erected a fence along the southeasterly boundary of the lands in suit.

In the period following 1896 the private claimants constructed levees to reclaim the lands "for general agricultural purposes, stock raising." Cross lived on the lands with his family and workmen from 1898 to 1907. In recent years portions of the area in suit have been improved for use by gun clubs. A public utility company erected power lines under an easement obtained from Cross in 1911. In the later twenties a toll road was constructed under a franchise from Solano county, and a local mosquito abatement district, the boundaries of which are identical with those of Solano county, has undertaken to destroy mosquito larvae on the marsh area. The lands have been assessed and taxed for state purposes annually since 1882, and there is evidence that since 1890 a number of civil cases have been

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[2] In 1928 Secretary of the Interior Work was compelled by mandamus to certify the land in Survey No. 34 for patent to the state as swamp lands. Work v. United States ex rel. O'Donnell, 23 Fed. (2nd) 136.

prosecuted in the state courts pertaining to them.

The present suit was begun by the United States in 1930. It resulted in a judgment for the defendants.

1. The grant to Castro was of the island named "La Yegua" (Mare Island) "in all its extent." In their petition to the Board of Land Commissioners the claimants represented the tract to be "an island and its boundaries easily defined." The decree of confirmation states: "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." It is the contention of the government that this decree conclusively establishes a valid title in the United States to all of the lands on the island above the line of ordinary high tide.

We are unable to see how the government's position can be successfully assailed. Mare Island lies in tidal waters. The phrase "water's edge", as here used, is synonymous with the shore and would seem clearly to call for a boundary at the line of mean high tide. "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails." United States v. Pacheco, 2 Wall. 587. And see Borax,

Ltd. v. Los Angeles, 296 U. S. 10, 22-25; Shively v. Bowlby, 152 U. S. 1, 29.[3]

It is undisputed that the marsh lands extending northwesterly from the uplands were all above mean high tide at the time of the grant and its later confirmation. On this point appellees concede that there was no natural channel or water course extending across the neck from the inner channel to San Pablo Bay. Numerous early charts and surveys in evidence, as elucidated by the testimony of expert witnesses, show conclusively that from the southerly tip of the island to the northwesterly extremity of the marsh land there has always been on either hand a well defined shore line unbroken by mean high tide.

But appellees insist that since the grant was made under the Mexican law, that law must be looked to to determine what was granted; and that under the Mexican law, the boundary between the sea shore, which was public, and the upland, which passed under private grant, was not the line of ordinary or mean high tide but the line reached by the highest tide during the year. They claim that

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[3]In California the rule is to the same effect. Teschemacher v. Thompson, 18 Cal. 11 (1861); Ward v. Mulford, 32 Cal. 365 (1867); More v. Massini, 37 Cal. 432, 433 (1869); People v. Morrill, 26 Cal. 336, 353-354 (1864); Wright v. Seymour, 69 Cal. 122, 126-127, 10 Pac. 323 (1886); Heckman v. Swett, 99 Cal. 303, 307, 33 Pac. 1099 (1883); Eichelberger v. Mills Land, etc., Co., 9 Cal. App. 628, 639-640, 100 Pac. 117 (1908); Forgeous v. County of Santa Cruz, 24 Cal. App. 193, 194-195, 140 Pac. 1092 (1914).

the neck immediately adjoining the high lands was shown to be below the line of highest high water and therefore the marsh lands in question were not embraced in the grant.

We need not consider the factual argument beyond saying that the record leaves the matter substantially in doubt. The decree is written in English and was rendered by a tribunal which may properly be described as functioning in a common law atmosphere. It is to be presumed in the absence of internal evidence to the contrary—and the decree contains no such evidence—that the terms used were intended to bear the meaning ordinarily attached to them at common law. United States v. Pacheco, supra. As said by Mr. Justice Field in San Francisco Sav. Union v. Irwin, supra: "By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the daily tides ebb and flow." And see, Valentine v. Sloss, 103 Cal. 215, 219. Indeed, in the cases involving decrees confirmatory of Mexican grants, where a boundary lay upon the sea or an arm of the sea, the line of ordinary high tide has, so far as we are advised, invariably been held to be the true boundary.[4]

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[4]See further on the general subject: Coburn v. San Mateo County, 75 Fed. 520; Teschemacher v. Thompson, 18 Cal. 11; Ward v. Mulford, 32 Cal. 365; More v. Massini, 37 Cal. 432.

2. Appellees urge that on the early charts and by common repute as of the middle of the last century the name "Mare Island" was applied to the high area only. They say further that the grant to Castro was a grant of a place by name, without specific boundaries; hence it covered only the land shown to have been in possession of the grantee. The application of the latter rule, it is said, excludes all of the lands in suit.

The showing before the Board on the matter of Castro's possession was that he placed a considerable number of horses and mares—seventy or eighty head—on the island under the care of Indian employees, and that he built a hut and corral on the upland. There is no evidence that the animals confined their grazing to the high lands, and it does not appear that they were close herded there or were excluded from the marshy land by any natural or artificial barrier. Presumably they grazed at will over the whole area, as it is commonly known that livestock find good grazing on the salt grass of marsh lands of this type after the passing of the spring season.

But whatever may be the fact, there is no occasion to inquire into the extent of Castro's occupancy, or into the matter of early repute. Specific boundaries are given in the decree. It describes the area to which title is confirmed as an island bounded by the water's edge. It is now too late to argue that the grant to Castro was not of the whole island but of a limited portion of it only. Where a decree

specifies the boundaries of the tract to which title is confirmed it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." United States v. Hancock, 133 U. S. 193, 196. And the decree is none the less conclusive because it may be thought that in the circumstances the Land Commissioners might well have given the grant a narrower construction than they did. United States v. Coronado Beach Co., 255 U. S. 472, 487-488. The law on the subject is too well settled to warrant multiplication of authorities. On the classification of grants, see San Francisco v. Le Roy, 138 U. S. 656; Higueras v. United States, 5 Wall. 827.

3. The Freeman Survey. Pursuant to the act of July 1, 1864, c. 194, §1, 13 Stat. 332,[5] the United

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[5]The statute, after providing for publication of notice of the survey, states that if no objections are made to it the surveyor-general "shall approve the same, and transmit a copy of the survey and plat thereof to the commissioner of the general land-office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days, by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the surveyor-general shall transmit to the commissioner of the general land-office at Washington a copy of the survey and plat, and objections, and proofs filed with him in support of

States surveyor-general for California, Rollins, in 1877 instructed Freeman, a deputy surveyor, to survey Mare Island in conformity with the decree. Having made his survey, Freeman filed with the surveyor-general his plat and notes and a general description of Mare Island, purportedly delineating the boundaries of the island at "the water's edge at ordinary high-water mark". By this survey the island was found to embrace both the high lands and the whole reach of tule lands here involved, namely, the area bounded by Carquinez Strait and San Pablo Bay on the south and southwest, Navy Yard Slough on the north, and Napa River and Mare Island Strait on the northeast.

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the objections, and also of any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said commissioner he shall indorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California, touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall indorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the commissioner of the general land-office, it shall be the duty of the said commissioner to cause a patent to issue to the claimant as soon as practicable after such approval."

Rollins published notice of the return of the survey the first publication being October 11, 1877. The survey and plat were retained in his office for the 90-day statutory period allowed for the filing of objections. No objection or protest was lodged during the time limited. On November 5, 1877, Ames, who had succeeded Rollins, transmitted Freeman's tracing and account to the commissioner of the general land office, who promptly authorized payment for Freeman's services. On August 6, 1879, surveyor-general Wagner, who had succeeded Ames, forwarded a copy of the survey and plat to the general land office. In his letter of transmittal Wagner stated that he considered the survey incorrect. As thus returned the survey was filed without any action being taken thereon by the commissioner.

It is the position of the government that the boundaries as fixed by this survey foreclose any further question as to the extent of Mare Island. It is contended that the 1864 Act does not require the formal endorsement on the plat of the commissioner's approval where no exception has been taken to the survey within the statutory time; and that the record shows that Freeman's work has long been accepted by the land department as the official survey of the island.

We are not able to agree. We think the statute requires a formal certification of the commissioner's action if in fact the survey meets with his approval. There was no such certification. Indeed, there is no satisfactory evidence that the plat was ever accepted

by the department as correct. While the survey has perhaps some evidentiary value it is not conclusive.

Freeman included as part of Mare Island the lands lying northeasterly of Boat Cutoff or Dutchman's Slough; but charts accepted by all parties as accurate show conclusively that the bed of the continuous water course known as Boat Cutoff has always been well below the line of mean high tide. Accordingly the land lying beyond it cannot be taken as a part of Mare Island. It is a separate island.

4. The trial court found that appellees and their predecessors have for fifty years possessed the land adversely under claim of right and color of title. Appellees concede, though, as they must, that the statute of limitations does not run against the sovereign and that title by prescription cannot be acquired to property of the United States.

5. The Act of March 3, 1891, 26 Stat. 1095, 1099, provides that "suits by the United States to vacate and annul any patent . . . shall only be brought within six years after the date of the issuance of such patents." It was held below that the suit is barred by this statute in so far as cancellation is sought of the swamp land patents issued by the Department of the Interior in 1896 and 1910.

We think otherwise. It is settled that the 1891 act has reference only to patents issued for lands open to disposition through the general land office. It is "strictly a part of the public land laws." United States v. Minnesota, 270 U. S. 181, 196, and

cases there cited. In United States v. O'Donnell, supra, the court pointed out that the Swamp Lands Act effected the transfer of an interest in the land granted "only so far as they were part of the public domain" at the time of the grant, and that the act "could not include lands which the Government had not acquired." It is clear that the department was wholly without authority to dispose of the lands in suit in the absence of legislation authorizing their sale. Smelting Co. v. Kemp, 104 U. S. 636, 641, 646. And see Northern Pacific Ry. Co. v. United States, 227 U. S. 355, 367. Since the patents are mere nullities, United States v. Conway, 175 U. S. 60, 68, they present no impediment to the assertion of the government's title. The case of United States v. Chandler-Dunbar Co., 209 U. S. 447 is readily distinguishable.

6. Appellees say that for a long period of time both the United States and the state of California recognized and agreed upon the southeasterly boundary of swamp land survey No. 569 as the boundary beyond which Mare Island navy yard did not extend. They claim that by the course of events what amounts to a public boundary has been established at that line between the state and federal sovereignties, the latter having jurisdiction over the naval reservation and the former exercising jurisdiction over the territory outside the reservation. Authorities are invoked holding that where a public boundary line has long been acquiesced in, that line is conclusively taken to be the correct one even if as

an original matter it could be shown that the line should have been located elsewhere.[a]

The argument is too far-fetched to warrant extended comment. It appears to be an assertion in another guise of the claim of prescriptive title. We do not have here a suit between sovereign states concerning a political boundary. The issue involved is the title to real property claimed to have been acquired by the United States by private purchase. Under the constitution Congress alone has power to dispose of property of the United States. The fact that the state of California has exercised over the land the powers of a sovereign has no perceivable bearing on the question of ownership. It proves no more than that the state and county authorities indulged the mistaken assumption that the private claimants owned the land. Moreover, there never was as between the state and the United States a mutual agreement, express or implied, that the boundary of the navy yard lay at the line where the navy yard people erected the fence in 1914. Down to the time of the decision in the O'Donnell case the grantees of the state were continuing to assert that the true boundary lay elsewhere, and extended litigation has been required to dispel the uncertainties overhanging the whole matter.

7. Finally, it is urged in support of the judg-

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[a] The principal cases cited are Oklahoma v. Texas, 272 U. S. 21, 47; Michigan v. Wisconsin, 270 U. S. 295; Indiana v. Kentucky, 136 U. S. 479; New Mexico v. Colorado, 267 U. S. 30.

ment that the suit by the United States is lacking in equity. This asserted defense, which, incidentally, the trial court declined to pass upon, appears to be indistinguishable from laches or equitable estoppel although those names are not applied to it. The argument is that the United States should not at this late date be allowed to prevail in view of the long-continued acquiescence of its officials in the decision in San Francisco Sav. Union v. Irwin, supra, and the later issuance to the state of the swamp land patents. In reliance on this course of conduct, it is said, appellees and their predecessors were induced to extend large sums in the reclamation and improvement of the lands.

It appears from the record that officials of the government felt that the land had been lost to the United States as the result of the decision in the Irwin case, although, as more exhaustive investigations have disclosed, the true facts were not before the court in that action. It is to be observed that the facts respecting the tidal conditions obtaining on the island were at least within the possibility of knowledge on the part of claimants willing to take note of those conditions or desirous of investigating the available evidence. Certainly, the law applicable to those conditions was announced clearly enough in the Irwin decision.

Mare Island had been acquired and was held by the United States in its sovereign capacity as part of a program of national defense. Those claiming adversely to the government knew that Congress

had never relinquished title to any part of the swamp lands in dispute, if in fact these were a part of the area acquired; and they were chargeable with knowledge that the sole power to dispose of property of the United States resides in Congress. Absent an adjudication of the extent of the government's title, in a suit to which the United States was a party, it could not safely be assumed by any claimant that the swamp land patents issued to the state were to be taken for more than they might ultimately prove to be worth. Smelting Co. v. Kemp, supra. Compare United States v. Walker River Irr. Dist., 104 Fed. (2d) 334. From the beginning the rights of those claiming under the state have been shrouded in doubt and uncertainty.

It is settled beyond debate that in suits brought by the government for the protection of public rights, unauthorized conduct on the part of its officers, or arrangements or agreements by them not having the sanction of law, do not constitute a defense or give rise to an estoppel. Utah Power & Light Co. v. United States, 243 U. S. 389; Lee Wilson & Co. v. United States, 245 U. S. 24; Jeems Bayou Club v. United States, 260 U. S. 561; Cramer v. United States, 261 U. S. 219, 234. The chief criticism to which responsible public officials may be subject here is the delay in seeking an authoritative determination of this long standing controversy. But, on considerations having their roots in necessary public policy, laches on the part of its officers is not imputable to the government. United States

v. Beebe, 127 U. S. 338; United States v. Kirkpatrick, 9 Wheat. 720. If we assume the existence of the equities contended for, it is nevertheless "manifest that the prayer for their enforcement is in the nature of things beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government", Lee Wilson & Co. v. United States, supra.

In respect of the lands lying northeasterly of Boat Cutoff or Dutchman's Slough the decree below is affirmed. Otherwise it is reversed.

Denman, Circuit Judge, concurring:

This is a concurrence in all of Judge Healy's opinion, despite the grossly inequitable result arising from the Government's reliance on its freedom from the defense of laches. It is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court.

If we were to accept Judge Mathews' view that the district court has made a finding, in effect, that the "place" which at the time of the grant to Castro and at the time of the confirmation to Bissell and Aspinwall was called Isla de la Yegua or Mare Island did not include any land here in controversy, such a finding cannot be sustained in this court because of the admission of appellees' brief here that:

"To avoid any misunderstanding of our position, we do not claim that there was any natural channel or water course extending across the neck from the Mare Island Straits side to the San Pablo Bay side, although some of the maps would tend to show such a break. We think that the evidence, particularly the Coast survey charts and surveys, indicates rather clearly that the marsh area in the neck was above *mean* or *ordinary* high tide, which Lieutenant Smith repeatedly testified was the shore line indicated upon the charts." [Italics by the court.]

The charts referred to in this admission were made in 1850, prior to the great "slickens" deposits of the hydraulic mining of the later years of the 1850 decade.

Nor can I accept certain dictionary definitions to the effect that the word "island" does not always mean land completely surrounded by water against the applicable holding of Justice Fields' opinion in United States v. Pacheco, 2 Wall. 587, and other cases cited in Judge Healy's opinion.

Mathews, Circuit Judge (dissenting in part):

Appellant, the United States, acquired its title, if any, to the land in controversy from Bissell and Aspinwall, who acquired their title, if any, by mesne conveyances from Victor Castro, who ac-

quired his title, if any, by grant from the Mexican government. Bissell and Aspinwall could and did convey to appellant only the land which was granted to Castro and confirmed to Bissell and Aspinwall. The land so granted and confirmed was in the decree of confirmation (May 8, 1855) described as—

> "The place [which] is situate in the Bay of San Francisco, and is called 'Isla de la Yegua' or Mare Island, and being an Island is bounded by the water's edge."

In the case at bar, the District Court found, in effect, that the "place" which at the time of the grant to Castro and at the time of the confirmation to Bissell and Aspinwall was called Isla de la Yegua or Mare Island did not include any of the land here in controversy. The finding is amply supported by evidence.

The last part of the above quoted description should be read with and construed in the light of the first part; and it should be remembered that the word "island" does not always mean land completely surrounded by water. International Dictionary, "Island," definition 2; Century Dictionary, "Island," definitions 2 and 3. "The words 'island' and 'isle' are sometimes used for a piece of land isolated during high tide or surrounded by marsh; e. g., Hayling Island, Ile of Ely." Encyclopaedia Britannica, 14th Edition, Vol. 12, p. 715.

Even now, at highest high tide, the land in controversy is completely separated by water from the land which in 1855 was called Isla de la Yegua or

Mare Island. Considering the huge quantities of silt which the evidence shows—and we know judicially—have been deposited in San Francisco Bay since 1855, it is not improbable that in 1855 the two tracts were completely separated by water at ordinary high tide. Be that as it may, appellant acquired only the land which in 1855 was called Isla de la Yegua or Mare Island; and the land in controversy was not then so called.

The judgment should be affirmed.

[Endorsed]: Opinions. Filed Jun 30, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 9507.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY W. STEWART, et al.,

Appellees.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of

the United States for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause, and hereby is, affirmed in respect of the lands lying northeasterly of Boat Cutoff or Dutchman's Slough, and otherwise the said decree be, and hereby is reversed.

[Endorsed]: Filed and entered June 30, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, October 16, 1941.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of Circuit Judges William Denman and William Healy, It Is Ordered that the petition of appellees, filed July 28, 1941, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. McCutchen, Olney, Mannon & Greene, counsel for the appellees Stewart et al., and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 16, 1942; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN
United States Circuit Judge

Dated: San Francisco, California
October 17, 1941

[Endorsed]: Filed Oct. 18, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellees, Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, West End Land Company and James Irvine, request that

you prepare a transcript of record to be filed with the Supreme Court of the United States on petition of Appellees for a writ of certiorari in the above entitled cause, said transcript of record to include the following:

1. The entire record upon which the above entitled cause was heard by the United States Circuit Court of Appeals for the Ninth Circuit, and that you include in the printing all of Exhibits D-1, D-2 and D-3.

2. The proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit, including

(a) Order of Submission,

(b) Order Directing Filing of Opinions and Filing and Recording of Judgment,

(c) Opinions,

(d) Judgment,

(e) Order Denying Petition for Rehearing,

(f) Order Staying Issuance of Mandate.

3. This Praecipe and service thereon.

It is further requested that you transmit to the Supreme Court of the United States with the certified transcript of record all of the original exhibits on file.

Dated: October 23, 1941.

J. M. MANNON, JR.
A. CRAWFORD GREENE
ROBERT L. LIPMAN
Attorneys for defendants and appellees Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, and West End Land Company.

W. H. SPAULING
THOMAS E. PALMER
Attorneys for defendant and appellee James Irvine.

Service of the within Praecipe and receipt of a copy thereof is admitted this 23rd day of October, 1941.

NORMAN M. LITTELL
Assistant Attorney General.
FRANK J. HENNESSY
United States Attorney.
ESTHER B. PHILLIPS
Assistant United States Attorney.
OSCAR A. PROVOST
Special Assistant to the Attorney General.
By FRANK J. HENNESSY.
ESTHER B. PHILLIPS.
Attorneys for appellant.

[Endorsed]: Filed Oct. 24, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause and Number.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five volumes, numbered Volumes I, II, III, IV and V, containing the following pages: Volume I, pages 1-354, pleadings; Volume II, pages 355-722, testimony; Volume III Book of Exhibits, pages 1-321, printed exhibits; Volume IV, Book of Exhibits, pages 1 to 54, maps; and Volume V, Exhibits and Proceedings in Circuit Court of Appeals, pages 1 to 173, to be a full, true and correct copy of the entire record together with original exhibits transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the Appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this ..... day of November, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 8 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

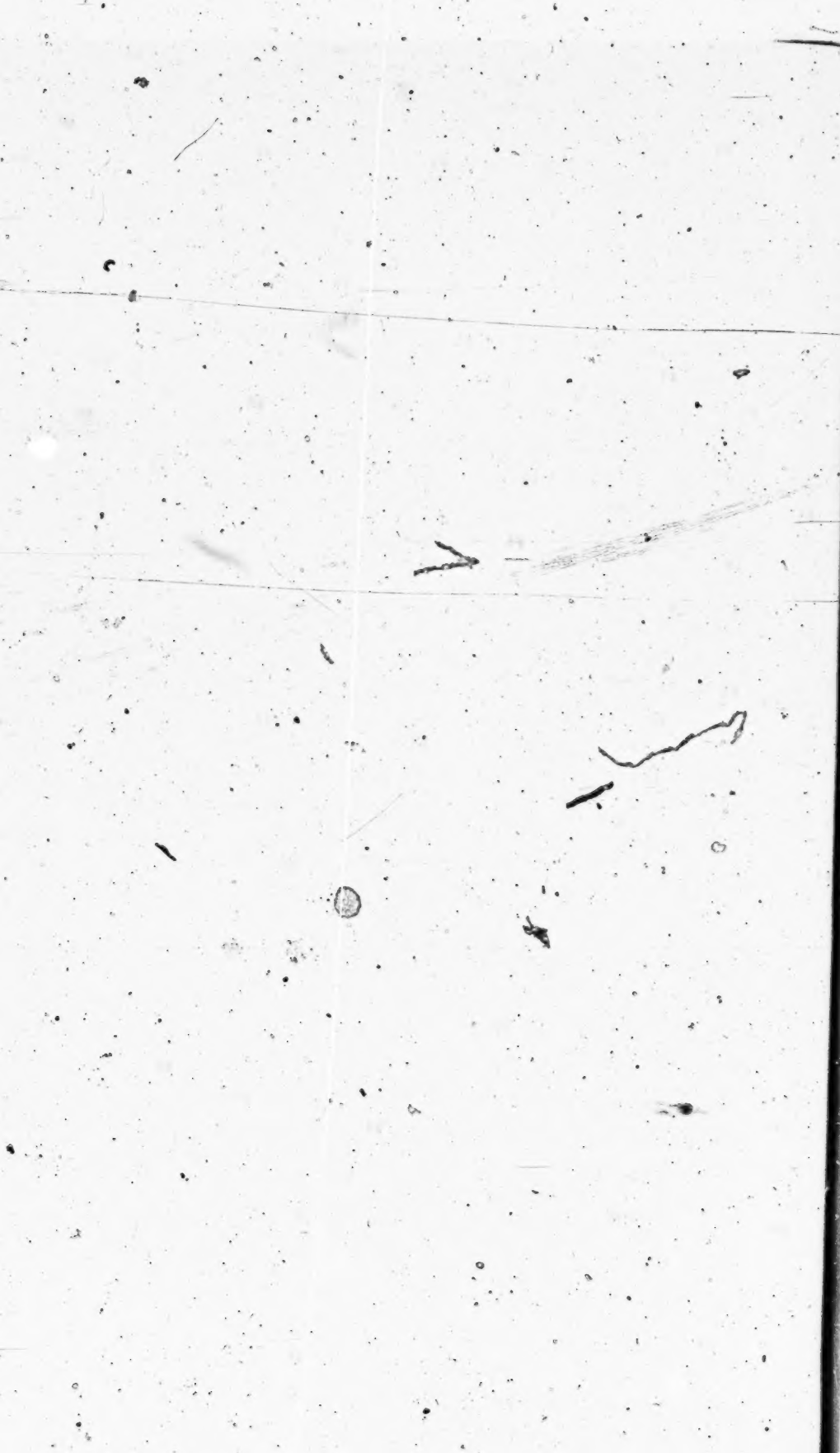
PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION

J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for Petitioners.

W. H. SPAULDING,
THOMAS E. PALMER,
Of Counsel.

January 3, 1942.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ____

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Mary W. Stewart, Sears Point Toll-Road Co., American Trust Company, Bay Land Company, Field and Tule Land Company, West End Land Company and James Irvine, respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit (R. V—169) entered June 30, 1941 in a case numbered and entitled on its docket No. 9507, *United States of America, Appellant, v. Mary W. Stewart; et al., Appellees,*

reversing a judgment of the United States District Court for the Northern District of California, Southern Division, in favor of your petitioners. Petition for rehearing was denied October 16, 1941. (R. V—170)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit by the United States to cancel three federal land patents and to quiet title. The lands claimed by the government had been in the undisturbed and undisputed possession of their private owners for forty years prior to the bringing of this suit. The patents which the government now seeks to cancel were, when suit began, 34, 20 and almost 6 years old, respectively. The property covered by them was originally waste marsh land. It has been reclaimed and improved by the private owners at a cost to petitioners themselves, exclusive of the cost of acquisition and of reclamation and improvements by their predecessors, in excess of $300,000. The government does not propose to reimburse the private owners for all or any part of their expenditures.

In 1841 Juan B. Alvarado, the then Mexican Governor of the Californias, granted to Victor Castro an island in the Bay of San Pablo, an arm of San Francisco Bay, named "La Yegua" or Mare Island. (R. V—39-40) Upon the page opposite we reproduce the government's Exhibit L-H1, showing Mare Island and, colored by us in red, the swamp lands here in controversy. The maps and other evidence all show that the only area ever known as or called Mare Island was the high land bearing that

Plaintiff's Exhibit L-11
U. S. Coast Survey
1863

3

N A P A B L O

name, as shown on the Exhibit. Petitioners contend that only the high land was granted to Castro. It is conceded that if the large expanse of swamp land to the northwest, which was never known as Mare Island, was not included in the grant, it passed to the State of California under the Swamp Land Act.

There is evidence in the record that all of the swamp land to the northwest of the island was, in its natural state, slightly above mean or ordinary high-water mark. Basing its claim upon that evidence, the United States asserts that all of these swamp lands were confirmed by the Board of Land Commissioners as a part of Mare Island. The government, as purchaser of the Castro grant, claims that the grant included all of these lands and therefore they did not pass under the Swamp Land Act.

In the 1880's this identical claim was made and litigated in an action of ejectment brought by the private owners against the Commandant of the Mare Island Navy Yard. The decision was against the government. The Commandant, represented by the United States Attorney and a special assistant employed by the government (Defts.' Ex. 20, R. I—177, II—667, III—203), set up the government's claim of title as a defense to the action (R. III—305-308). Mr. Justice Field, sitting in circuit with Judge Sawyer, held that these swamp lands were not a part of Mare Island, were not embraced within the Castro grant and had passed to the State of California under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. The case was carried to this Court upon a writ of error sued out at the direction of the Acting Attorney

General of the United States (Defts.' Ex. 21, R. I—177, II—669, III—204), and this Court affirmed the judgment below upon the authority of *Wright v. Roseberry* (1887) 121 U. S. 488. See *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

This result was accepted by everyone as final. While the State ceded jurisdiction over Mare Island to the United States, it retained jurisdiction of the swamp lands here involved. (Cal. Stats. 1854, Chap. XLIII, p. 48) The Commandant of the Navy Yard cooperated in making a survey of the boundary line of the lands which had been adjudged to belong to the private owners. (R. II—690-693) The lands were then leveed, reclaimed, improved and made valuable by petitioners and their predecessors at a cost to petitioners alone, as we have said, in excess of $300,000. (R. II—524-526; 676-688; 717-718; Defts.' Ex. 45, R. II—710, III—285-286) A portion of the area was patented by the United States to the State of California in 1896, 34 years before this suit was brought (Defts.' Ex. 6, R. II—651, III—189), another and larger portion was patented in 1910, 20 years prior to this suit (Defts.' Ex. 7, R. II—652, III—192) and the remainder in 1924, a few days within the period of the federal six-year statute of limitations (Defts.' Ex. 8, R. II—652, III—196). Petitioners, who are the present owners, all made their purchases and improvements after patents had issued, relying upon the *Irwin* decision, the consistent recognition of the State's title by federal as well as state officials, and upon the government's patents.

In 1930, without any explanation or showing of equity, the United States sought to disavow all that had gone on

before and to wrest from the private owners the lands that they had made valuable at so great a cost. To that end this suit was brought by the United States to cancel its outstanding patents and to quiet title. In plain disregard of every principle of equity and fair dealing the government has sought to repudiate its own patents, disavow the results of the *Irwin* litigation, ignore the applicable statute of limitations and set itself above the principles that govern the granting of equitable relief.

This the trial court held the United States might not do. After a protracted trial in which all of the issues were exhaustively examined, it was held—following exactly in that respect the *Irwin* decision—that the lands in controversy were not a part of Mare Island, were not embraced within the Castro grant (R. I—261); and had passed to the State under the Swamp Land Act (R. I—259). The trial court further held that as to the patents which were issued 34 and 20 years before the suit was brought the action was barred by the federal six-year statute of limitations, U. S. C., Title 43, §1166 (R. I—278), the case being ruled by the decision of this Court in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447 (R. I—169). The Court further indicated, without deciding (R. I—169-176), that the position of the government was so grossly inequitable that, upon ordinary principles of equity, the court would not grant relief.

The Circuit Court of Appeals for the Ninth Circuit, one judge dissenting, reversed. Rejecting the holding of the trial court and the decision in the *Irwin* case alike, two of the judges held that, by virtue of the confirmation decree the lands should be taken to be within the Castro grant

and therefore did not pass to the State under the Swamp Land Act. (R. V—154-158) The majority further held, in plain disregard of the *Chandler-Dunbar* decision, that the federal six-year statute of limitations was not applicable (R. V—161-162), though the case is obviously within the exact language of the statute:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U. S. C., Title 43, §1166)

And finally, though the court was sitting as a court of equity and though the result was admittedly inequitable —indeed, was so grossly inequitable that the concurring opinion suggested Congressional remedial action (R. V—166)—the court concluded that it was powerless to stay its own hand from doing inequity (R. V—163-167). The holding of the majority is that the United States, unlike any other litigant, is free to come into a court of equity and demand, in a suit brought by it against its own citizens, that the court shall exercise its extraordinary equitable powers for the purpose of granting relief which is grossly inequitable and unjust.

As indicated, one of the judges dissented. He held—in accordance with the *Irwin* decision—that the land was not a part of Mare Island and therefore passed to the State under the Swamp Land Act. (R. V—167-168)

It is petitioners' position that not only is the decision of the majority of the Circuit Court of Appeals wrong on the merits, but that its holding that the United States may come into a court of equity and demand relief that is

inequitable is so contrary to the accepted and usual course of proceedings in equity as to call for the exercise by this Court of its power of supervision.

To avoid a possible misapprehension, it should, perhaps, be added that while this case and *United States v. O'Donnell* (1938) 303 U. S. 501, are sometimes referred to as companion cases—because they both involve questions relating to the extent of Mare Island—the fact is that they involve different lands and the issues decided in the *O'Donnell* case are entirely different from those presented here. The title to the lands involved in the *O'Donnell* case was not adjudicated in the *Irwin* case. In the *O'Donnell* case, unlike this case, the private claimants had never been in possession of the land, nor had they bought after or in reliance upon the government's patents. In the *O'Donnell* case the trial court found that the lands there involved were a part of Mare Island, whereas the finding here is just the other way. Moreover, in this case, unlike the *O'Donnell* case, there was no concurrence by the courts below upon the finding. In the *O'Donnell* case the action was brought within the period of the statute of limitations, while in this case one of the patents was 34 years old and another was 20 years old when suit was brought. In that case the equities were all with the government—here it is admitted in the concurring opinion that the result of the majority's decision is so "grossly inequitable" as to warrant Congressional remedial action. The questions presented in this case are equally as important as, if not more important than the questions presented in the *O'Donnell* case and should be settled finally by a decision of this Court.

OPINIONS BELOW

The opinion of the District Court is reported in 29 F. Supp. 59 and appears in the record (R. I—165-176), and the opinions of the Circuit Court of Appeals for the Ninth Circuit are reported in 121 F. (2d) 705 and appear in the record (R. V—148-169).

STATEMENT OF BASIS OF JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, U. S. C., Title 28, §347(a).

2. The decree of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed was entered June 30, 1941. (R. V—169-170) Petition for rehearing was filed July 28, 1941 and was denied October 16, 1941. (R. V—170)

QUESTIONS PRESENTED

Whether the United States Circuit Court of Appeals for the Ninth Circuit erred

(1) In holding that it was free to ignore the adjudication of the identical title involved in this case in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

(2) In holding that the federal six-year statute of limitations (U. S. C., Title 43, §1166) does not apply to the swamp land patents which were issued in this case 34 and 20 years, respectively, before suit was brought.

(3) In holding that, when the United States comes into a court of equity as a litigant seeking equitable relief against its patents, it is entitled to a preferred position over private litigants and is not subject to the ordinary principle that a court of equity will not do inequity.

(4) In holding that the United States may not be estopped, however unjust and inequitable its claim may be.

(5) In holding, contrary to the finding of the trial court supported by compelling evidence, that the lands in suit were a part of Mare Island and were embraced within the confirmed Castro grant.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The decision below is in conflict with the applicable decisions of this Court.

(a) This Court has adjudicated the identical title here involved, the effect of its decision being that title to the lands had vested in the grantees of the State of California under the Swamp Land Act. The issues, both of fact and of law, were thoroughly considered and determined in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. That decision was affirmed on a question of law by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. In this case the Circuit Court of Appeals, with one judge dissenting, has rejected the result of the prior adjudication. It is a matter of the gravest concern if those dealing with land titles emanating from the federal government cannot safely rely upon an adjudication

of the identical title in a litigation carried to this Court. The question is of far-reaching importance.

(b) This Court held in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, that the federal six-year statute of limitations (now U. S. C., Title 43, §1166) applies to actions by the United States to set aside its land patents in cases precisely parallel to this one. The court below has refused to follow the *Chandler-Dunbar* decision and has erroneously ruled that the statute does not apply. An important question of federal land law is involved, which should be settled finally by this Court.

2. The decision of the majority below is in conflict with decisions of other circuit courts of appeal on the same matter and so far departs from the accepted and usual course of judicial proceedings in equity as to call for an exercise of this Court's power of supervision.

(a) A majority of the Circuit Court of Appeals have held, contrary to the repeated course of decisions in other circuits, that the United States is entitled to relief in equity, in a suit brought by it to cancel land patents, which would be denied any other suitor because of the inequity of its claim: *Iowa v. Carr* (C. C. A. 8th Circ., 1911) 191 Fed. 257, 266, *United States v. D. & R. G. W. R. Co.* (C. C. A. 8th Circ., 1926) 16 F. (2d) 374, 376, *United States v. Chandler-Dunbar Water Power Co.* (C. C. A. 6th Circ., 1907) 152 Fed. 25, 41, *United States v. National City Bank* (C. C. A. 2d Circ., 1936) 83 F. (2d) 236, and to the earlier decision of the Circuit Court of Appeals for the Ninth Circuit in *Mountain Copper Co. v. United States* (C. C. A. 9th Circ., 1906) 142 Fed. 625, and to the

decisions of this Court, *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321.

(b) The majority of the Circuit Court of Appeals have come to the conclusion that the United States is entitled to equitable relief, though one of the majority states that the result is so grossly inequitable that it calls for Congressional remedial action. (R. V—166) The conclusion that a court of equity will grant affirmative relief, though the relief thus granted is patently unjust, so far departs from the accepted and usual course of judicial proceedings in equity as indicated by the cases last cited as to call for the exercise by this Court of its power of supervision.

3. The majority holding has resulted in a hopeless and irreconcilable conflict of decision in the lower courts upon the question as to the proper construction of the confirmation decree. The evidence overwhelmingly sustains the trial court's finding that the lands involved in this case were not in fact a part of Mare Island and were not granted to Castro. Mr. Justice Field and Judge Sawyer have so decided in the *Irwin* case, as has Judge Mathews in this case. Even the majority have not held otherwise. They have held, however, contrary to the finding below and the holdings of all of the other judges, that the confirmation decree must be construed as embracing all of these lands. This Court should exercise its power of supervision to bring about a uniformity of decision upon the important issues involved.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court,

directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket No. 9507, *United States of America, Appellant, v. Mary W. Stewart, et al., Appellees,* and that the decree of said Circuit Court of Appeals be reversed, and that your petitioners have such other and further relief in the premises as to this Court may seem proper.

J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ROBERT L. LIPMAN,
Attorneys for Petitioners.

W. H. SPAULDING,
THOMAS E. PALMER,
Of Counsel.

Dated: San Francisco, California.
January 3, 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. _____

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

A reference to the official reports of the opinions delivered in the courts below is set forth in the petition (p. 9) and, for brevity, that reference is adopted here.

II.

STATEMENT OF JURISDICTION

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 9) and, by this reference thereto, is hereby adopted.

III.

CONCISE STATEMENT OF THE CASE

A summary statement of the matter involved is given in the petition (pp. 2-8) and, to avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1 to 5, inclusive (pp. 9-10), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT

The argument of petitioners can be summarized as follows:

1. The title to the identical lands here involved was previously adjudicated in an action against an officer of the federal government, who defended upon the basis of

the same claim of title in the United States as that made here. It was there held that the United States had no title and that the lands had passed to the State under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. That adjudication stood unchallenged for a period of 40 years prior to the bringing of this suit, during which time it was respected and relied upon by everyone having anything to do with the matter. Upon the strength of that decision the lands were patented to the State and thereafter hundreds of thousands of dollars were invested by petitioners in purchasing and improving the land, all with the knowledge of the government. Upon the plainest principles of justice, and pursuant to the settled rule of *stare decisis*, the Circuit Court of Appeals was duty-bound to follow the earlier decision, as the trial court did, and erred in refusing to do so.

2. Swamp-land patent No. 72, which the government asks be cancelled, was issued in 1896 or 34 years before this suit was brought and swamp-land patent No. 152, which the government also seeks to cancel; was issued in 1910 or 20 years before this suit was brought. As to these patents the suit is plainly barred by the federal six year statute of limitations. Act of Congress March 3, 1891, §8. (26 Stats. 1095, 1099, U. S. C., Title 43, §1166) *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447.

3. In this case the United States has come into a court of equity, seeking affirmative equitable relief against its own land patents. The circumstances of the case are such

that granting the relief thus sought would be unjust and inequitable in the extreme. Indeed, one of the majority below, though concurring in the reversal of the trial court, was so impressed with what he said was the "grossly inequitable" result that he suggested there should be Congressional relief. Petitioners contend that the United States, like any other litigant, is subject to the governing principles of equity and cannot have affirmative relief in equity which is grossly inequitable.

4. The circumstances of this case are such as clearly give rise to an equitable estoppel. The holding of the court below that the sovereign may not be estopped is contrary to the repeated decisions of the federal courts.

5. The trial court, in passing upon the merits of the case, found that the lands here involved were not a part of Mare Island, were not granted to Castro and were not embraced within the confirmation decree and hence did not belong to the United States. This holding—which accorded exactly with the decision of Mr. Justice Field and Judge Sawyer in the *Irwin* case and with the views of Judge Mathews in this case—is supported by the great weight of the evidence. The majority below, without ruling that the lands were in fact a part of Mare Island or were in fact granted to Castro, have set aside the trial court's finding upon the ground that the lands were embraced within the confirmation decree. In so doing they not only disregarded the mandate of Rule 52(a) of the Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous" but by their adverse decision on the merits have created an irreconcilable conflict in the decision of this point by the lower courts. This

Court should exercise its powers of supervision to bring about a uniformity of decision upon this critical issue.

ARGUMENT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN THE *IRWIN* CASE, IN WHICH THE TITLE TO THE IDENTICAL LANDS WAS ADJUDICATED. THE COURT BELOW ERRED IN REFUSING TO FOLLOW THE EARLIER DECISION.

We are here concerned with land titles emanating from the federal government, upon which patents have issued. This Court has on more than one occasion remarked upon "the immense importance and necessity of stability of titles dependent upon these official instruments".* The importance is, of course, greatly enhanced when it appears, as it does here, that, prior to the issuance of the patents, the identical title was adjudicated, especially when the case was carried to the highest court in the land. Such adjudication, long acquiesced in as it was in this instance, becomes a rule of property—a rule of the particular title—from which the lower courts are not free to depart.† The refusal of the court below to be guided by this principle

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**United States v. Maxwell Land-Grant Co.* (1887) 121 U. S. 325, 381; *United States v. Stinson* (1905) 197 U. S. 200, 204.

†To avoid any misunderstanding of our position, it should be said that we recognize that the *Irwin* decision, although rendered in a litigation against an officer of the government, is not *res judicata* as to the United States in view of such decisions as *Carr v. United States* (1879) 98 U. S. 433, and *United States v. Lee* (1882) 106 U. S. 196. Those cases, however, do not involve the principle upon which we rely

gives rise to a question of the utmost importance, affecting, as it does, many land titles.

From early days this Court has recognized and frequently applied the general principle of *stare decisis* in cases involving land titles. In a comparatively recent case this Court held that the rule must be applied, even against the United States and even though the United States was suing on behalf of Indian wards of the government. In *United States v. Title Insurance & Trust Co.* (1924) 265 U. S. 472, the United States, as guardian for certain Mission Indians, sought to quiet title to a perpetual right of the Indians to occupy, use and enjoy lands which were part of a Mexican land grant that had theretofore been confirmed and patented to others by the United States. The Indians had not presented their claim to the Board of Land Commissioners for confirmation. Some twenty-three years earlier the Supreme Court had decided that, in the absence of presentation of a claim for confirmation to the Board of Land Commissioners, the Indians had no right of possession, use or occupancy.* In the subsequent case it was contended, just as the United States contends here and as in effect the majority of the Circuit Court of Appeals have held, that the earlier decision was wrong and should be departed from. In rejecting this contention and in holding and emphasizing the importance of adhering to the earlier decision this Court said:

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here—which is that after an adjudication of the identical title has been allowed to stand for many years, so that those dealing with the title have purchased and made their improvements in reliance upon the adjudication, the courts will, in later litigation, adhere to the earlier decision.

*Barker v. Harvey (1901) 181 U. S. 481.

"The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago, and affected many tracts of land in California, particularly in the southern part of the state. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results. Besides, the government and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as Minnesota Min. Co. v. National Min. Co., 3 Wall. 332, 18 L.ed. 42, this court said (p. 334): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.'"

This rule has particular, and we might add peculiar, application where, in the subsequent litigation, the identical title is again involved. As many courts of last resort have held, it would be intolerable if the same title, after

having been adjudicated by a highest court and the adjudication's having stood for many years, were to be open to re-ajudication. As this Court pertinently observed in the quotation given above,

> "'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open'." (265 U. S. 486)

To illustrate this principle as applied to cases involving the identical title, it suffices to refer to a few cases which, in their essential aspects, approach the facts of the case at bar. In *Ingoldsby v. Juan* (1859) 12 Cal. 564, the California Supreme Court adjudicated the title to certain lands, the title to which turned upon the validity of a deed made by Donna Martina Castro to her children. Some years later, in the case of *Hihn v. Courtis* (1866) 31 Cal. 398, an attempt was made to relitigate the validity of this same deed as it affected the title to the same land, just as here the United States seeks to re-adjudicate the scope and effect of the confirmation decree. There, as here, the contention was that the previous decision was wrong and should not be followed. The court, in an opinion* which we commend to this Court, held that although the principle of *res judicata* did not apply, the matter was no longer open to reconsideration, saying (p. 402):

> "That decision has become a rule of property with reference to this land, and many parties may have

*It is interesting to note that the opinion was written by Associate Justice Lorenzo Sawyer who later, as United States Circuit Judge, participated with Mr. Justice Field in the decision of the *Irwin* case. Moreover, the decision was concurred in by Associate Justice Rhodes, who was appointed special counsel for the government in the *Irwin* case.

purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former adjudication under such circumstances, because a majority of the present court might arrive at a different conclusion from that attained by their predecessors—men equally well qualified to discern, and equally conscientious in the pursuit of the right, would be to trifle with the rights of litigants and bring merited obloquy upon the administration of justice.

* * *

"There was an adjudication on the identical deed—the identical title—eight years ago, and important rights may, and probably have, been acquired on the faith of that adjudication. If after a lapse of so long a term this adjudication could now be properly disturbed, in the language of Mr. Fearne, before cited, 'Even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security.' It could, in fact, hardly be called a 'temporary security.' For these reasons we decline to re-examine the grounds of the decision in *Ingoldsby v. Juan*, and without intimating any opinion as to the correctness or incorrectness of the conclusions attained, adhere to it in this case on the principles of *stare decisis*."

A very illuminating application of the rule is afforded by two decisions of the Supreme Court of Michigan. In *Winans v. Willetts* (1917) 197 Mich. 512, the rights of the parties turned upon the question whether Winans Lake was in point of fact navigable or non-navigable,

just as this case turns upon whether the lands were a part of Mare Island and within the confirmed Castro grant. The Supreme Court of Michigan held that the lake was non-navigable. Some nine years later the identical question arose in *Pleasant Lake Hills Corporation v. Eppinger* (1926) 235 Mich. 174. It there appeared that the corporation, relying upon the former adjudication, had acquired the Winans lands and had expended some $170,000 in improvements. The defendants sought to relitigate the question of title to the lake. Mr. Justice Fellows, who dissented in the earlier case, wrote the opinion of the court and squarely ruled that the title could not be re-adjudicated. He said:

> "The writer of this opinion did not then agree with the opinion of the court in that case and wrote in dissent. But it is unimportant what his views then were or now are. We think it is likewise unimportant what views any or all the members of the court as now constituted entertain. Every reason for the application of the doctrine of stare decisis demands that this court accept the holding of the court in that case as final. The property involved is the same. The rights asserted are the same. In reliance upon the decision in that case, plaintiff has invested $170,000. Every element of fair dealing with litigants requires us to recognize the doctrine of stare decisis, and as applied to the same property follow the decision in that case. If it is to be ever overruled, it should be in a case involving other property than that specifically passed upon there."

The same principle was applied by the Supreme Court of Michigan in *St. Helen Shooting Club v. Carter* (1929)

248 Mich. 376, where the Court followed its earlier decision in *St. Helen Shooting Club v. Mogle* (1926) 234 Mich. 60.

The Supreme Court of Tennessee has very forcefully announced the same principle. In *Burr v. White Oak Lumber Co.* (1924) 149 Tenn. 191, the question of title turned in part upon the validity of a tax deed, which the trial court held to be valid. It appeared, however, that some 27 years previously the Supreme Court of Tennessee, in the case of *Darrow v. Wright,* held the identical tax deed to be void, just as in the *Irwin* case it was decided that the confirmation decree did not cover the lands here in suit. The Supreme Court of Tennessee held the failure to follow the earlier decision was error, saying:

> "We are of the opinion, however, that the validity of this tax sale is not an open question in Tennessee.
>
> * * *
>
> "A title previously passed upon, although in a suit between different parties, ought not to be again controverted and examined in a case presenting the same question upon the same facts.
>
> * * *
>
> "So we think that the decision in Darrow v. Wright established a rule of property as to the land covered by the tax deed from B. Lee to Freddie Matson. This decision became the law of the Matson title, and we are not willing to disturb it after 27 years.
>
> "Although there was no written opinion in Darrow v. Wright, the decree was none the less effective to declare the law of that title. It was necessarily relied on by everyone who examined the title to any portion of this land and purchased any portion thereof."

In the case of *Fisher v. Lott* (1908) 33 Ky. L. 609, the question of title turned upon the provisions of a will. Some 43 years previously the same will had been before the court. It was contended that the former adjudication was wrong and should not be followed. The Court of Appeals of Kentucky held, however, that the question was not open to re-examination, saying:

> "Whatever doubt we may have had concerning the construction placed upon this clause of the will is resolved in favor of that consistency which ought to prevail in the opinions of the court concerning identical matters, particularly where the title to real estate is involved, and upon the faith of which previous opinion the public may have been led into a sense of security in trafficking in these titles, relying upon the presumption that, when once authoritatively construed by the court of last resort of the state, that construction is conclusive."

We forbear further citation. The rule, as well as the reason for it, must be plain. Both are in exact harmony with the underlying principles upon which this Court grants certiorari to prevent and resolve those conflicts of decision which are so inimical to the orderly administration of justice.

Upon the record, the case here is much stronger in calling for uniformity of decision than the usual one. Not only has the identical title been adjudicated against the identical claims now made by the government, but upon the strength of that adjudication the government issued its patents. Following the issuance of those patents and in reliance upon them the present owners bought their lands

at a cost of many thousands of dollars, improved them and made them valuable. Of the six judges in the courts below who have passed upon the question, four have held that the lands do not belong to the United States. The remaining two would repudiate all that has been decided before, in flagrant disregard of the principle that protects those who, in dealing with land titles, rely upon a final decision of a court of last resort.

It is stated in the principal majority opinion that the rights of those claiming under the State have from the beginning been shrouded in doubt and uncertainty and, absent an adjudication of title to which the government was a party, those claiming under the State were not entitled to rely upon the government's patents. As to the matter of doubt and uncertainty, while doubt may have existed prior to the *Irwin* decision, from the time of that decision in 1890 down to the filing of this suit there was no doubt or uncertainty whatever. The record shows beyond any possibility of dispute that private parties and government officials alike regarded that decision as final. The record is barren of any dissent from or question of it.

As to the suggestion that, absent an adjudication of title to which the government was a party, petitioners were not entitled to rely upon their patents,—surely it cannot be the law that after this Court has passed upon and adjudicated a particular land title, those dealing with that identical title ought to regard the matters thus adjudicated as being still unsettled. Nor should it be the rule, as the opinion below implies, that official patents of the United States are nothing more than, to use the phrase of Mr.

Fearne, "precarious temporary security," conveying only a speculative title. On the contrary, where, as in this case, patents have issued after a decision of this Court that title has passed from the government, those patents should be deemed conclusive.

It is respectfully urged that this Court should, by an authoritative decision, settle this important principle of land law.

II.

THE ACTION IS CLEARLY BARRED BY THE FEDERAL STATUTE OF LIMITATIONS AS TO THE PATENTS WHICH WERE 34 AND 20 YEARS OLD WHEN SUIT WAS BROUGHT.

After the decision of this Court in the *Irwin* case the government issued patents to the State of California covering all of the lands involved in this suit. Swamp-land patent 72 was issued in 1896, 34 years before this action was brought, and swamp-land patent 152 was issued in 1910, 20 years before. As to those two patents the action is plainly barred by the federal six-year statute of limitations, Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166), which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."

The case is, of course, within the exact language of this statute. The government has claimed, however, and a majority of the court below have held, that the statute

does not apply where the Land Department did not have jurisdiction to issue the patent and, so it is said, there was no jurisdiction here because the lands were within the confirmed Castro grant. Aside from the fact that that question has, as we have seen, been concluded by the *Irwin* litigation and, as we shall later see, the evidence conclusively shows that these lands were not within the confirmation decree, this Court has held that a claim of want of jurisdiction in the Land Department affords no defense to the statute. This point was directly ruled upon in the leading case of *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, a unanimous decision written by Mr. Justice Holmes.

In the *Chandler-Dunbar* case the patent under attack purported to be issued upon a scrip location. After the patent had issued the government claimed, just as it does here, that the patent was absolutely void because the Land Department had no jurisdiction, the lands having been reserved at the time of patent. It is obvious that if the land was in fact reserved at the time of patent it was just as much beyond the jurisdiction of the Land Department as would be the case of land embraced within a confirmed Mexican grant. The Supreme Court declined to pass upon the question whether the land was in fact reserved, holding that, assuming it was, none the less the patent was protected by the statute and should be held to be good. The ruling upon this point is contained in two short paragraphs and is so important that we quote:

> "There is force in the contention of the United States that the land was reserved and that it had not

been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368. *The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect.* It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued', it describes the purport, and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land at least, which cannot escape from the jurisdiction, generally are held to affect the right even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605, 17 L. ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct.

Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692. *This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place.** See United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup Ct. Rep. 368."

The majority below have sought to read an exception into the statute by holding that the statute is "strictly a part of the public land laws"† and hence applies only to patents under those laws. The patents under attack here were issued under the Swamp Land Act of 1850, which is one of the important acts of Congress disposing of large areas of the public lands. Assuming, however, that that Act is not one of the public land laws, the answer to the majority below is that this Court has itself held the statute to be applicable to a patent issued upon a confirmed Mexican land grant, which by no stretch of language could be said to be a patent issued under the public

*All emphasis throughout this brief is ours unless otherwise expressly noted.

†In support of this conclusion the majority have taken out of its context this phrase appearing in the opinion in *United States v. Minnesota* (1926) 270 U. S. 181, 196, and have misapplied it. In that case the United States was suing not, as here, in its own right, but in the interest of its Indian wards. The purport of the decision is that the statute, while it binds the interests of the United States, does not bind the interests of other persons. This is apparent from the cases cited in the opinion dealing with Indian lands, such as *Cramer v. United States* (1923) 261 U. S. 219, 233, and *LaRoque v. United States* (1915) 239 U. S. 62. The case in no respect modifies the doctrine of the *Chandler-Dunbar* decision that where the interests of the United States alone are involved the statute applies.

land laws. See *United States v. Coronado Beach Co.* (1921) 255 U. S. 472, 488. There are numerous similar decisions in the lower federal courts where certiorari has been denied. See *United States v. Hogan* (C. C. A. 9th Circ. 1934) 72 F.(2d) 799, cert. den. 295 U. S. 752, *Putnam v. Ickes* (C. A. D. C. 1935) 78 F.(2d) 223, 227-228, cert. den. 296 U. S. 612.

There is no warrant whatever for the attempt of the majority below to read an exception into the statute nor for their refusal to follow the controlling decision of this Court. Their decision is the more flagrant because it results in the very hardship which it was the purpose of the statute to avoid. Here the only interests involved, other than those of petitioners, are those of the United States itself. Therefore, as this Court so well said in the *Chandler-Dunbar* case, whether the Land Department had authority to issue the patent or not

> "the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect."

It is submitted that the majority below have decided this federal question in a way which is in conflict with the applicable decisions of this Court and that certiorari should be granted to the end that there may be uniformity upon this important question involving so many land titles.

III.

THE COURT BELOW ERRED IN HOLDING THAT THE UNITED STATES, WHEN IT COMES INTO A COURT OF EQUITY SEEKING AFFIRMATIVE EQUITABLE RELIEF, IS NOT SUBJECT TO THE ORDINARY PRINCIPLE THAT A COURT OF EQUITY WILL NOT DO INEQUITY.

The outstanding feature of the decision of the court below is the great injustice of the result that has been reached. This is not merely our characterization of the case—it is what the majority, who pronounced the judgment, have themselves recognized. The principal majority opinion asserts that the injustice is no defense, even to a plea for *equitable* relief, (R. V—165-166) and that any relief must be by legislative action (R. V—166). The circuit judge who concurred in that opinion did so, as he says, "despite the grossly inequitable result", adding that "it is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court". (R. V—166) We have, therefore, a decree of a court of equity which is confessed by those who made it to be most inequitable and unjust. This decision that the United States may have affirmative relief in equity, notwithstanding the gross injustice and inequity thereof, is not only in conflict with numerous decisions in other circuits, but presents the question whether the court below has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is difficult to state adequately the inequity and injustice that results from the decree below. The facts show, however, that the case here is an extreme one.

It first appears that the lands with which we are concerned were surveyed, preparatory to sale, as early as 1869. This survey was known as Swamp Land Survey 569. (Defts'. Ex. 4, R. II—648, IV—37) The land was sold to and paid for by one of petitioners' predecessors and was patented to him by the State of California in 1874. (Defts'. Ex. 5, R. II—651, III—185) It was stipulated that ever since 1882 all of these lands were each year assessed and taxed by the State of California or by its political subdivisions. (R. II—645)

In the 1880's, when the government was faced with a claim of a chain of title out of Castro prior to its own, the government's attorneys repudiated the Castro grant and succeeded in proving that it was a forgery and void. The Circuit Court for the Northern District of California so held in *Bouldin v. Phelps* (1887) 30 Fed. 547. It is not surprising, therefore, that it was assumed that the government did not rely upon that grant. It hardly need be added that Bouldin, who was claiming under the Castro grant, was not one of the petitioners' predecessors in interest.

A controversy between petitioners' predecessors and officers of the government at the Navy Yard developed and on September 13, 1883 the *Irwin* suit was filed by petitioners' predecessors, alleging that they were the owners of the land in Survey 569 and that Irwin, who was the Commandant at the Navy Yard, was excluding them from possession. (R. III—287-290) Irwin set up in his answer the same claim of title in the United States as

that asserted in this action (R. III—305-310) and, as we know, Mr. Justice Field and Judge Sawyer decided that claim adversely to the government upon all points. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. Not satisfied with this result, the government's attorneys carried the case to this Court, where the judgment was affirmed. *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

With the matter seemingly finally adjudicated by the highest court in the land, actual reclamation and use of the land by the private owners proceeded, with full knowledge and acquiescence by the government and appropriate affirmative action upon its part. As early as 1885 a portion of the land had been sectionized and a township plat thereof officially approved. (Defts'. Ex. 41, R. II—711-712, IV—51). This township plat was followed in due course by a patent dated June 5, 1896 from the United States to the State of California covering that portion of Survey 569 shown upon the township plat. (Defts'. Ex. 6, R. II—651, III—189.)

The evidence shows that Dr. L. E. Cross bought the land toward the end of 1895 (R. II—720) and forthwith took steps to levee and reclaim it. (R. II—524-525). To make sure that there would be no controversy with the government, Dr. Cross wrote to the Commandant under date of December 5, 1896 as follows:

"Sir:

"I intend within the next thirty days to begin the reclamation of the tule land north of the Govern-

ment boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Deptmt to do the work for me, which he refuses to do without your knowledge and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine." (R. II—690-691)

To this, the Commandant replied:

"In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein." (R. II—692)

The work of leveeing the land, known as Island No. 1 (R. II—526, see also IV—35-36), took two years (R. II—686) and cost in excess of $80,000 (R. II—689). The work was done with a large clam shell dredger (R. II—687) and necessarily was done with the knowledge of the government. Moreover, when those on Island No. 1 wanted to go to town (Vallejo), they crossed Mare Island Straits on the ferry at the Navy Yard (R. II—536) and, with the permission of the authorities at the Yard, Cross built a road from Island No. 1 along the intervening "neck"

of marsh land over to Mare Island itself (R. II—528-529, 536-538), so that they could reach the ferry.

In 1904 another portion of Island No. 1 was sectionized and the township plat thereof approved (Defts'. Ex. 42, R. II—712, IV—52) and on February 7, 1910 those portions of Island No. 1 shown on that plat were patented to the state. (Defts'. Ex. 7, R. II—651-652, III—192) Township plats covering the rest of the land involved in this suit were approved in 1923 (Defts'. Exs. 43 and 44, R. II—712, IV—53 and 54) and the land was patented to the state on April 26, 1924 (Defts'. Ex. 8, R. II—652, III—196) This action upon the part of the government was taken advisedly. The record shows that the Land Department communicated with the Navy Department and ascertained that, as a result of the *Irwin* litigation, the Navy Department made no claim to these lands, and accordingly they were patented. (Defts'. Ex. 37, R. II—707, III—260-265)

This action by the Land Department was, of course, in line with that taken by the Navy Department on the ground. In 1914 that Department erected the present boundary fence between the lands involved in this suit and those claimed by the Navy (i. e., between the lands in Swamp Land Survey 569, which were litigated in the *Irwin* case, and those in Swamp Land Survey 34, which were involved in the *O'Donnell* case) and that fence has been maintained by the Navy ever since. (R. II—588) It was also in line with the action of the Navy Department in recording in the Recorder's Office of Solano County on November 10, 1913, in Book 5 of Maps at page 4, a

formal map of the Mare Island Navy Yard Reservation, in accordance with the Act of the California Legislature of March 2, 1897 (Cal. Stats. 1897, p. 51) ceding jurisdiction of lands occupied by the United States for military purposes or defense. The Court will note that this map (R. IV—38) shows that the reservation did not cover any of the lands involved in this suit, but stopped at the Navy Yard fence.

We have already seen that all of the present petitioners, without exception, purchased their lands after the decision in the *Irwin* case and also after the land had been included in the public land surveys and had been patented to the state. The lands were purchased at a cost to them in excess of $180,000 (R. II—679-685, 717, III—285) and, as we have said, they spent in excess of $300,000 in improving them.

The government contends that notwithstanding all this, it is now free to come into a court of equity, and, without offering to do equity or to make any restitution, repudiate all that has gone on before, including its own patents which were freely issued, and take from petitioners the lands which they and their predecessors have so long held and, at such great expense, have made valuable. It is difficult to imagine a case more wanting in equity. Manifestly, a private person could not prevail in a court of equity upon a claim so barren of any justice. At the behest of a private person equity would decline to exercise its extraordinary powers to bring about such a wanton result.

The important question which the decision below poses is—Is the United States entitled to a preferred status, so

that it may have relief in equity when its claim is wanting in every element of essential justice? Or, when the United States comes into a court of equity, is it subject to the guiding principles which govern the granting of equitable relief? Upon this point there should be but one answer.

The case here is not one, as the concurring opinion below would suggest, of mere laches on the part of the government. We have here far more than mere delay, as the facts recited above show. We have an over-all result that is essentially unjust, and the unusual spectacle of a court of equity declaring that it is without power to stay its own hand from doing this injustice. Such a declaration by the court is in conflict with the reported decisions of this Court and with those of many of the other circuits. The decisions are numerous and practically in accord on the proposition that when the United States comes into equity seeking relief it does so on the same footing as other litigants (except as to laches and limitations) and a court of equity will not decree, at the instance of the United States, that which is essentially inequitable and unjust.

In *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, this Court, in a suit in equity, declined to decree a transfer of stock in defendant bank held by the estate of a deceased paymaster to satisfy the government's statutory priority, where, under the bank's charter, the bank had the right to be paid the indebtedness due it before transfer of the stock, the holding being:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come

as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States v. Mitchell, 9 Peters, 743, have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject." (35 U. S. 614)

In *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321, in denying the government relief where it sought to set aside land patents as against a bona fide purchaser, this Court said:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions." (200 U. S. 339)

In *United States v. Norwegian Barque "Threkla"* (1924) 266 U. S. 328 this Court, sitting in admiralty but

applying the principles of equity, held that if the government comes into court seeking damages for a collision at sea it is liable, just as any private litigant would be, for damages equitably assessable against it, saying:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." (266 U. S. 339-340)

Surely it is not holding the government up to too high a standard to require that, in suits brought by it against its own citizens, it shall be held to have agreed "that justice may be done with regard to the subject matter".

The expressions of the Court which we have quoted are not mere occasional sporadic statements of an exception to the general rule, but indicate a consistent course of decision, enunciating what is the usual and accepted principle. They find their counterpart in numerous decisions of the lower federal courts. A few citations will suffice to illustrate.

In *United States v. National City Bank* (C. C. A. 2nd Cir. 1936) 83 Fed. (2d) 236, certiorari denied 299 U. S. 563, it was held that the United States, seeking in equity to recover a bank deposit as assignee of the Russian government, is subject, like any other litigant would be, to a claim of set-off, the court saying:

> "The United States suing, having no more rights than its assignor, is subject to that set-off. When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases." (83 F. (2d) 239)

In *United States v. Devereux* (C. C. A. 4th Cir. 1898) 90 Fed. 182, it was held that after long delay the United States could not enforce a trust deed given to secure certain judgments, where the property had come into the hands of innocent purchasers, the court saying:

> "It was suggested in argument that as the United States in this case comes into court claiming rights as cestui que trust under a deed between private parties, and asserting these rights as a private individual would, the case does not involve any governmental right or duty; that, therefore, the ordinary rules controlling courts of equity as to laches should be enforced. This position cannot be maintained. The United States do not and cannot hold property as a monarch may for private or personal purposes. Van Brocklin v. Tennessee, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (U. S. v. Insley, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confined; nor are they bound by any statute of limitations (U. S. v. Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006).
>
> "With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties." (90 Fed. 186)

In *Mountain Copper Co. v. United States* (C. C. A. 9th Cir. 1906) 142 Fed. 625 it was held that the United

States would be denied injunctive relief against fumes of a copper smelter which had destroyed timber and vegetation on public lands, where similar relief would be denied a private person, the court saying:

> "It is the well-established law that, when the government comes into a court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." (142 Fed. 629)

In *The Falcon* (D. C. Md. 1927) 19 Fed. (2d) 1009 the government was denied relief against a tug which was alleged to have been responsible for a collision because, during the four years' delay in bringing suit, the tug had passed into hands of innocent purchasers against whom it would have been inequitable to grant relief. It was there said:

> "There is, indeed, an element of estoppel against the United States involved in the facts of the case at bar, by reason of its failure to act for a period of two years after the injury was suffered, and its seeming acquiescence in the sale of the tug. Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity. While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity, and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." (19 F. (2d) 1014)

In *United States v. Flint* (C. C. Cal. 1876) 25 Federal Cases 1107, #15,121, the government was denied relief upon equitable grounds, against a decree of confirmation alleged to have been obtained by fraud, the court saying:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. * * * And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.
>
> * * *
>
> "All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." (25 Fed. Cas. p. 1113)

In *United States v. Dominion Oil Co.* (D. C. Cal. 1917) 241 Fed. 425 the government was denied a temporary injunction and receiver as to oil lands within a presidential withdrawal upon the ground that a private litigant could not have such relief, the court saying:

> "I conceive it to be clearly established, both upon reason and authority, that the government, in such a case as this, and even under circumstances so persuasively in its favor, possess no higher or different rights than a private individual seeking similar relief would possess. The fact that the securing or conserving of oil as a fuel for its navy, whereby it may properly defend or even perpetuate itself, is involved, does not add to its rights in this court nor change its character as a suitor. What it may do because of

military necessity through its executive branch does not concern us here." (241 Fed. 427)

The court below has, we respectfully submit, erred in not giving effect to the rule of these cases. Its decision gives the government a status, as a party litigant in equity, to ask and receive relief that is grossly inequitable. That the government does not enjoy such a status and that it may not have relief that is against all conscience is attested by the cases cited.

Upon general principles of equity the court below should have denied the government the relief sought in this case.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE GOVERNMENT IS NOT SUBJECT TO A PLEA OF EQUITABLE ESTOPPEL.

The facts previously reviewed (pp. 20-24, *supra*) not only establish a case in which upon general principles of equity relief should be denied, but make out a plain case of equitable estoppel. As we read the opinion below (R. V—163-166), the essence of the holding is, not that the facts at bar are insufficient to establish a case of equitable estoppel if that defense be available, but rather that the sovereign is not subject to the defense. This holding is in direct conflict with decisions in other circuits upon the same matteer.

Undoubtedly the leading case in the federal courts upon the subject of equitable estoppel as against the sovereign

is *Iowa v. Carr* (C. C. A. 8th Cir. 1911) 191 Fed. 257. In that case the question was whether the sovereign, the State of Iowa, was estopped to claim certain lands which were uncovered by a sudden avulsion of the Mississippi River. Upon facts much less extreme than those presented here the court held that the sovereign was estopped.

> "Counsel for the appellants, however, invoke the general rule that neither by the statute of limitations, nor by laches, does mere delay bar the sovereignty from maintaining its rights or from sustaining a suit to enforce them. (Citing cases) They also contend that every sovereignty is exempted from the rule of equitable estoppel.
>
> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.
>
> "The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances." (191 Fed. 265-266)

After reviewing the authorities the court concluded, even as the court below in this case should have concluded:

> "There is no equity in the claim of the state against the plaintiffs in this case, it does not appeal to the

conscience, it is met by an equitable estoppel, it was not presented or prosecuted with reasonable diligence, and a court of equity will not sustain it." (191 Fed. 270)

The same rule has been announced by the Circuit Court of Appeals for the Eighth Circuit in a case where the United States was held to be estopped to recover certain right-of-way lands in view of the inequity of its claim. In *United States v. D. & R. G. W. R. Co.* (C. C. A. 8th Cir. 1926) 16 F. (2d) 374 the court said:

"The equitable claims of a state or the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim or be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim" (16 F. (2d) 376)

In *United States v. Chandler-Dunbar Water Power Co.* (C. C. A. 6th Cir. 1907) 152 Fed. 25* it was claimed, even as it is claimed here, that the patent under attack was issued in excess of jurisdiction of the Land Department and therefore should be cancelled. The Circuit Court of Appeals for the Sixth Circuit indicated, however, that relief should be denied upon grounds of equitable estoppel, saying:

"It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without

*Affirmed in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447 upon the ground that the suit was barred by the federal statute of limitations.

regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. 41)

The authorities are so exhaustively analyzed and reviewed in *Iowa v. Carr* that we forbear further citation. That case has been cited by this Court with approval* and has repeatedly been followed. It would be a work of supererogation for us to cover the ground so thoroughly and painstakingly covered in the opinion in that case.

In the opinion below (R. V—165) a number of cases are cited as supporting the conclusion that the government may not be estopped. An examination of the opinions in those cases will disclose that in none of them would a private individual, upon the facts, have been estopped. With all deference, it is submitted that those cases do not stand for any general proposition that the government may not be estopped.

We respectfully urge that the court below erred in holding that the defense of equitable estoppel was, as a matter of law, not available against the government.

V.

UPON THE MERITS, THE CONFIRMATION DECREE DID NOT EMBRACE ANY OF THE LANDS IN SUIT AND THE COURT BELOW ERRED IN NOT SO HOLDING.

The decision of the majority below is not only inequitable and unjust,—it is wholly unnecessary. As the dissent-

*Pan American Petroleum etc. Co. v. United States (1927) 273 U. S. 456, 506.

ing opinion makes clear (R. V—167-169), the whole matter should be disposed of by construing the confirmation decree as it is written—and, we might add, as it was construed by the trial court and in the *Irwin* case—as embracing only the lands "called" Mare Island. Had the majority pursued this course instead of ignoring the mandate of Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact should not be set aside unless clearly erroneous", all of the problems that their decree now presents, and its injustice as well, would have been avoided.

We are not unmindful of the fact that ordinarily a question relating to the proper construction of a particular decree is not available upon certiorari. Here, however, the petition presents important questions of law, and some of those questions may prove to be troublesome. In such circumstances, where the whole cause can be disposed of by determining a question of the proper construction of a confirmation decree, it is open to this Court to pursue that course. And this is all the more so where, as here, the judgment below results in an irreconcilable conflict of decision upon this particular issue in a way that tends to bring the due administration of justice into disrepute. The case is one where this Court may appropriately exercise its powers of supervision to bring about that consistency of decision that should result from a proper functioning of the judicial process.

The trial court found that the lands in suit were never known as or referred to as or by the name of Mare Island, that they were not a part of Mare Island and were not

embraced within the Castro grant or within the decree of confirmation of the Board of Land Commissioners. (R. I—261) That being so, these lands passed to the State under the Swamp Land Act.

There is no evidence whatever that these lands were ever called or referred to as Mare Island. A great mass of evidence, particularly the government's official maps (see, as illustrative, IV—13, 15, 17, 19, 35 and 36), demonstrates the contrary. The majority below have not found and could not find that these lands were ever called or referred to as Mare Island. Instead, they have held that the lands were nevertheless embraced within the confirmation decree and were thus excluded from the Swamp Land Grant.

This question has now been passed upon by six judges, —the two judges in the *Irwin* case, the trial judge in this case and the three judges in the court below. Of these six judges, four of them, including Mr. Justice Field of this Court, have held the other way. And, we submit, rightly so.

The confirmation decree contains but a single sentence describing the land confirmed:

> "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (R. V—70)

The Court will note that the decree contains two calls —one for the place "called 'Isla de la Yegua' or Mare Island" and the other for "the water's edge". The majority, ignoring entirely the first call, have construed the

second as being a call for the common law line of ordinary high-water mark and have thus included all of the swamp land in Survey 569 to the northwest of Mare Island as being a part of the island. By this process they have erroneously multiplied the Castro grant more than five-fold.

That the majority have misconstrued the confirmation decree is plain. What Castro petitioned for was an island "in the Bay of San Francisco *called* 'Mare Island' ". (R. V—36) The grant to him recites his petition "for the ownership of the Island *named* 'La Yegu' " and grants him "said Island". (R. V—39) The petition for confirmation refers to "the Island *called* 'Isla de la Yegua' in the present County of Sonoma". The opinion of the Board of Land Commissioners shows at the outset that the proceedings were "for a place *called* Mare Island" and the only question that is considered in the Board's opinion is whether the grant to Castro was a forgery or not. (R. V—67-69) The Court will look in vain through the entire proceedings before the Board (R. V—1-72) for any indication or suggestion that anything other than the tract "*called* Mare Island" was being claimed or confirmed.*

*The only testimony before the Board identifying Mare Island was the testimony of General Vallejo, who testified:

> "It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two and a half miles in length. It is irregular in its width and contains a half a league of land, a little more or less." (R. V—22-23)

Mare Island is at the *mouth* of Napa Creek, as the map at page 3 of the petition shows, and is almost exactly 2½ miles long, whereas the lands involved in this suit are not at the mouth of Napa Creek and if added to Mare Island would make it 10 miles long.

Although it is plain that the only thing that Castro asked for or that was granted to him or that was confirmed was the place called Mare Island—and although four out of the six judges who have passed upon the question have confined the confirmation decree accordingly—the majority below have entirely disregarded this call and have held that the water's edge means the line of ordinary high-water mark.† So construed, the decree covers more than five times as much land as was asked for or granted. We do not contend that if the confirmation decree unmistakably and unequivocally covered all of the lands here in suit it could now be attacked because of error. But we do contend that where, as here, there are two calls in the decree—one that is in accordance with the grant as made and the other of which, as construed by the majority, would cover more than five times as much land as granted—upon the plainest principles that

†The majority below have not only entirely ignored the first call of the decree, but in construing the second call have given it a meaning contrary to the law of the grant itself, which, if followed, would have been consistent with the first call. It was clearly shown that under the Mexican law the grant to Castro went, not to the common law line of ordinary high-water mark, but only to the line of the highest high-water throughout the year. (R. II—624) The government's evidence, as well as that of petitioners (see, for example, R. II—527-528, 532-533, 540-541), showed without conflict that the narrow isthmus between Mare Island and the lands involved in this suit was repeatedly under water. According to the Mexican law, therefore, which was the law of the grant, the water boundary of the island granted to Castro did not extend beyond the isthmus and conformed exactly with what had always been called Mare Island. It is only by construing "water's edge" as meaning the common law boundary of ordinary high-water mark that there is any conflict in the two calls of the confirmation decree. Certainly the court below was not warranted in first giving a construction to the language of the decree that would bring about such a conflict and then, in resolving that conflict, rejecting the call that was in accordance with the grant and adopting a call that would embrace far more land as was asked for or granted.

construction should be adopted which would make the decree correct and in accordance with the grant,—not the one that would make it erroneous.

The applicable rule of construction is stated in 1 *Freeman on Judgments* (5th ed.), Section 76:

> "* * * of two interpretations of the language of the judgment, that one will be adopted which makes it correct and valid, in preference to the one which would make it erroneous."

As was so aptly stated by Judge Hoffman in *United States v. De Haro* (1862) 25 Federal Cases 803, #14,938, dealing with a parallel situation of a conflict in the calls of a confirmation decree:

> "If the language of the decree were explicit and unequivocal, it might be too late now to disturb it, notwithstanding that it might give to the claimants more than they asked for, or any of their witnesses pretended they were entitled to. But in so clear a case of mistake I consider it my duty to lay hold of any ambiguity or discrepancy in its language to enable me to restrict the confirmation to the land actually granted and occupied and claimed." (25 Fed. Cases 805)

The problem we have here has frequently arisen and been determined by the courts. For convenient reference we set forth in the appended footnote* a number of cases

*In *Parker v. Kane* (1860) 22 How. (63 U. S) 1, the description read:

> "Lots One (1) and Six (6) being that part of the northeast quarter lying east of the Milwaukee river * * *"

and it was held that the call for the lots by number controlled the call

in which it is held that a call for a place by name, where the call is correct and in accordance with the intention

for that part of the northeast quarter lying east of the Milwaukee River which embraced a considerably larger area.

In *Wise v. Watts* (C. C. A. 9th Cir. 1917) 239 Fed. 207, the description read:

> "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning" and so on by courses and distances "the said tract of land being known as Location No. 3 of the Baca Series * * *"

and it was held that there were three separate calls or descriptions and that the calls for the tract by name (i.e., as the tract granted to the heirs of Baca and as Location No. 3 of the Baca Series) controlled the metes and bounds description.

In *Piper v. True* (1869) 36 Cal. 606 the description was:

> "One undivided half part of all that certain tract or parcel of land situate, lying and being in the County of Contra Costa, in the State of California, known as the 'Rancho Canada del Hambre y las Bolsas,' being the tract of land upon which the Town of Martinez is situated, and the same confirmed to said Teodora Soto by decree of the District Court of the United States for the Northern District of California, and surveyed by order of the Surveyor General of the United States for California, by A. W. Von Schmidt, Deputy Surveyor, in March, 1860, and approved by said Surveyor General; the said tract, according to said survey, containing thirteen thousand three hundred and twelve and seventy-one-hundredths acres of land; saving and excepting therefrom the piece of land now occupied and inclosed by the parties of the first part, * * *"

and it was held that there were five calls and that the calls for "Rancho Canada del Hambre y las Bolsas" and "the land confirmed by the District Court of the United States" were controlling.

In *Haley v. Amestoy* (1872) 44 Cal. 132, the description was:

> "All the undivided two thirds (2/3) of all the lands known by the name of 'Rancho de San Vicente,' lying and being situate in the County of Los Angeles, and State of California; the lands of said rancho being known and described as follows, to wit: Beginning" and so on by courses and distances,

and it was held that the call "Rancho de San Vicente" controlled the courses and distances.

of the parties, prevails over some other call, even by metes and bounds.

Upon the merits it is plain that the confirmation decree was intended to be consistent with the Castro grant and was intended to confirm the place "called Mare Island". The majority of the court below have erred in failing to give the decree that effect. This error not only results in a decree that is harsh and unjust, but gives rise to a conflict of decision with the *Irwin* case upon the identical question that tends to bring the judicial process into disrepute. The situation is one in which this Court may appropriately exercise its powers of supervision.

Petitioners urge that a writ of certiorari be granted.

Respectfully submitted,

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W. H. SPAULDING,
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Dated: San Francisco, California, January 3, 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

BRIEF OF PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

BRIEF OF PETITIONERS

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is officially reported in 29 F. Supp. 59 and appears in the record (R. I—165-176), and the opinions of the Circuit Court of Appeals for the Ninth Circuit are officially reported in 121 F. (2d) 705 and appear in the record (R. V—148-169).

II.

STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, U.S.C., Title 28, §347(a).

2. The decree of the Circuit Court of Appeals for the Ninth Circuit to be reviewed was entered June 30, 1941. (R. V—169-170) Petition for rehearing was filed July 28, 1941 and was denied October 16, 1941. (R. V—170)

III.

CONCISE STATEMENT OF THE CASE.

This is a suit by the United States to cancel three federal land patents and to take from petitioners something over 4,000 acres of land, shown in red upon the map opposite. Prior to the bringing of this suit, these lands had been in the undisturbed and undisputed possession of petitioners and their predecessors for 40 years. At the commencement of this action the patents sought to be cancelled were 34, 20 and almost 6 years old, respectively.

These were originally waste marsh lands, similar to the large areas of marsh land shown in blue upon the map. They were reclaimed and improved by the private owners, at a cost to petitioners themselves, exclusive of the cost of acquisition and of reclamation and improvement by their predecessors, in excess of $300,000. The original reclamation and all of the work done by petitioners was done after this Court, in a prior litigation, had affirmed that title to these lands had passed to the State of California,

petitioners' predecessor in interest, under the Swamp Land Act of 1850. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U.S. 578. All of the petitioners bought and improved their lands after the United States had issued patents to the State of California, solemnly affirming the title thus adjudicated. The government does not propose to pay or reimburse petitioners, either for the lands themselves or for the reclamation work done or for the improvements made. It proposes to ignore the prior adjudication of title by this Court, to repudiate its own land patents and to wrest from the private owners the lands they have so long held and enjoyed, without even a pretense of equity or justice.

The history of these lands is briefly this:

In 1841 Juan B. Alvarado, the then Constitutional Governor of the Department of the Californias, granted to Victor Castro a tract of land in the bay of San Pablo, which is an arm of San Francisco Bay, named "La Yegua" or Mare Island. (Ex. D-1, R. II—384, V—38-40) The grant was, of course, made by the Mexican Government under the Mexican law and, as we shall later show, under that law the grant only embraced the area lying above the line of highest high-water throughout the year, which confined it to the high land which bears the name "Mare Island", as shown upon the map, *supra*. This explains why it is that the high land, and the high land alone, was named or called Mare Island. All of the evidence shows that the only area ever known as or called "Mare Island" was this same high land, including none

of the lands in controversy here, as the trial court found. (R. I—261)

G. W. P. Bissell and William H. Aspinwall, who had purchased Castro's claim to Mare Island, in 1852 presented the claim for confirmation before the Board of Land Commissioners established under the Act of 1851 for the settlement of private land claims in the State of California.[1] (Ex. D-1, R. II—384, V—4-6) Their petition was for the confirmation of the place "called 'Isla de la Yegua'" (Ex. D-1, R. II—384, V—4) or Mare Island, which had been granted to Castro. The only evidence before the Board as to what constituted Mare Island was the testimony of General Vallejo, who testified:

> "It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two and a half miles in length. It is irregular in its width and contains about a half a league of land, a little more or less." (Ex. D-1, R. II—384, V—22-23)

A reference to the map opposite page 3, *supra,* will show that this describes with considerable accuracy the island known as Mare Island, as distinguished from the lands here in controversy. Mare Island is at the *mouth* of Napa Creek or River and is almost exactly two and a half miles long. These facts were, of course, well known to General Vallejo, whose home lay just across Napa River at the point now occupied by the town bearing his name. Nowhere in the confirmation proceedings was any question raised as to the extent of Mare Island—the only question being, as the record will show (Ex. D-1, R. II—384, V—

[1]Act of March 3, 1851, 9 Stats. 631.

1-71), whether the grant to Castro was valid or fraudulent. With some difficulty the Board concluded that the grant could not be rejected as a forgery—although there were many suspicious circumstances (Ex. D-1, R. II—384, V—67-69)—and accordingly the claim was confirmed. (Ex. D-1, R. II—384, V—70)[1]

The confirmation decree, in describing the land confirmed, provided:

> "The place of which confirmation is given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (Ex. D-1, R. II—384, V—70)

The Court will observe that, conformably with the record before the Board, what was confirmed was the place *"called"*[2] 'Isla de la Yegua' or Mare Island."

In 1869 at the request of one Jacob C. Hinckley all of the lands in controversy here and certain others were surveyed by the County Surveyor of Solano County preparatory to their sale by the State of California under the

---

[1]It is perhaps significant that the United States bought out Bissell and Aspinwall in January, 1853 (Ex. H, R. II—398, III—70-74), before the case was tried before the Board; that the depositions upon which the case was submitted to the Board were very cursory, to say the least (Ex. D-1, R. II—384, V—7-32); and that after the case was automatically appealed under the statute to the district court the decree of the Board was, along with the decrees in thirty-seven other cases, confirmed by consent of the United States Attorney (Ex. D-2, R. II—384, V—141) without any trial or other consideration of the merits by the court. Interestingly, no final decree was entered by the district court until some 73 years later, when, on the eve of filing this suit, the government proceeded *ex parte* to procure the entry of a decree *nunc pro tunc* on April 15, 1930. (Ex. D-2, R. II—384, V—88-90)

[2]All emphasis throughout this brief is ours unless otherwise expressly noted.

Swamp Land Act, this survey being commonly known as Swamp and Overflowed Lands Survey 569. (Ex. 4, R. II—648, IV—37) The purchase price was paid and the lands were patented to John W. Pearson, assignee of Hinckley, in 1874. (Ex. 5, R. II—651, III—185-188) Petitioners are the successors in interest of Pearson. It is stipulated that whatever title passed to the State of California or to any of its successors in interest is now vested in petitioners. (R. II—644)

Notwithstanding that the only land ever known as or called Mare Island was the high land, and notwithstanding that this was all that was ever granted to Castro by the Mexican authorities, in the 1880's the United States laid claim to the swamp lands to the north-west of Mare Island, the claim being identical with the claim that is now made. There was evidence that these swamp lands to the north-west of Mare Island were slightly above mean or ordinary high-water mark—although below the line of highest high-water of the Mexican law—and the Government asserted that all of this vast area was included in the confirmation as a part of Mare Island and therefore did not pass to the State of California under the Swamp Land Act, but belonged to the United States.[1] Acting upon this claim, the Commandant of the Mare Island Navy Yard ousted petitioner's predecessors, whereupon they brought ejectment against him. The Commandant was represented by the United States Attorney and a spe-

[1]The area of the highland, which was granted, even if we include the fringe of tule marsh on the side toward Vallejo, was only some 900 acres (R. II—719), whereas the area claimed by the Government as constituting Mare Island would exceed 5200 acres or over five times as much.

cial assistant employed by the government (Ex. 20, R. I—177, II—667, III—203) who set up the government's claim of title as a defense. (R. III—305-308) Mr. Justice Field, sitting in circuit with Circuit Judge Sawyer, held that these swamp lands were not a part of Mare Island, were not embraced within the Castro grant and had passed to the State of California under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. The case was carried to this Court upon a writ of error sued out at the direction of the Acting Attorney General of the United States (Ex. 21, R. I—177, II—669, III—204) and this Court affirmed the judgment below upon the authority of *Wright v. Roseberry* (1887) 121 U.S. 488. See *Irwin v. San Francisco Savings Union* (1899) 136 U.S. 578.

This result was accepted as final by everyone. Previously, at the request of the Attorney General of the United States (Ex. 40, R. II—708-709, III—273-284), the State had ceded jurisdiction of Mare Island, including its swamp and tide lands, to the United States so that the United States could erect a navy yard, but by express provision this cession extended only to the northerly end of the high land (Cal. Stats. 1854, Chap. XLIII, p. 48, §2) and excluded all of the lands in suit here. And as early as 1885 a portion of the land was sectionized and a township plat thereof officially approved. (Ex. 41, R. II—711, IV—51) This township plat was followed, after this Court's decision in the *Irwin* case, by a patent dated June 5, 1896 from the United States to the State of California covering all that portion of Survey 569 shown upon the plat. (Ex. 6, R. II—651, III—189)

Toward the end of 1895 Dr. L. E. Cross purchased the swamp lands constituting Island No. 1 and forthwith took steps to levee and reclaim them. (R. II—524-525, 720) To make sure that there would be no controversy with the government, Dr. Cross wrote to Admiral Kirkland, the Commandant of the Navy Yard, under date of December 5, 1896 as follows

> "Sir: I intend within the next thirty days to begin the reclamation of the tule land north of the Government boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Deptmt to do the work for me, which he refuses to do without your knowledge and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine." (R. II—690-691)

To this, Admiral Kirkland replied:

> "In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein." (R. II—692)

The work of leveeing the land took two years (R. II—686) and cost in excess of $80,000 (R. II—689). The work was done with a large clam shell dredge, using at

times a 100-foot and at times a 120-foot boom (R. II—687) and necessarily was done with the knowledge of the Government.

In 1904 another portion of Island No. 1 was sectionized and the township plat thereof approved (Ex. 42, R. II—712, IV—52) and on February 7, 1910 those portions of Island No. 1 shown on that plat were patented to the State (Ex. 7, R. II—651-652, III—192). Township plats covering the rest of the land involved in this suit were approved in 1923 (Exs. 43 and 44, R. II—712, IV—53 and 54) and the land was patented to the State on April 26, 1924 (Ex. 8, R. II—652, III—196). This action upon the part of the government was taken advisedly. The record shows that the Land Department communicated with the Navy Department and ascertained that as a result of the *Irwin* litigation the Navy Department made no claim to these lands, and accordingly they were patented. (Ex. 37, R. II—707, III—260-265)

This action by the Land Department was exactly in line with that taken by the Navy Department on the ground. In 1914 that Department erected the present boundary fence between the lands involved in this suit and those claimed by the Navy (i.e., between the lands in Swamp Land Survey 569, which were litigated in the *Irwin* case, and those in Swamp Land Survey 34, which were involved in the *O'Donnell* case) and that fence has been maintained by the Navy ever since. (R. II—588) It was also in line with the action of the Navy Department in recording in the Recorder's Office of Solano County on November 10, 1913, in Book 5 of Maps at

page 4, a formal map of the Mare Island Navy Yard Reservation, in accordance with the Act of the California Legislature of March 2, 1897 (Cal. Stats. 1897, p. 51) ceding jurisdiction of lands occupied by the United States for military purposes or defense. This map (Ex. 9, R. II—652-653, IV—38) shows that the reservation did not cover any of the lands involved in this suit, but stopped at the Navy Yard fence.

All of the petitioners purchased their lands after patents had issued and at a cost, including improvements, in excess of $300,000. West End Land Company bought its property in March, 1923, over thirteen years after the land was patented. It paid $27,000 for the land and, up to 1929, had expended in excess of $25,000 in improvements. (R. II—684) Field & Tule Land Company bought its holdings some twenty years before the trial, about seven years after patent had issued. (R. II—680) This holding contained about 500 acres, for which the company paid $25 or $35 an acre. (R. II—680-681) Its improvements cost well in excess of $35,000. (R. II—682) Bay Land Company bought its land in 1920, ten years after patent had issued. Its holding contained 631 acres, for which it paid $35 per acre. Its improvements cost an additional $22,540. (R. II—717) Sears Point Toll-Road Co. bought its right-of-way lands, extending the whole length of Island No. 1, between 1926 and 1928 and built 7.3 miles of road at a cost in excess of $180,000. (R. II—678-679) James Irvine purchased his lands in 1928, for which he paid approximately $100,000, and in addition spent $26,000 on improvements. (R. II—685-686) Mary W. Stewart also purchased her lands in 1928, paying

$18,000, in addition to which she spent $11,550 for improvements. (Ex. 45, R. II—722, III—285-286)

In 1930, without warning or explanation or showing of equity, and like a bolt out of the clear sky, the government brought this suit for the purpose of taking from petitioners these lands, which eveyone, including the government, had recognized as privately owned for forty years. By this suit the government seeks to ignore the decision in the *Irwin* case, to repudiate its solemn patents, to evade the plain bar of the statute of limitations as to the patents issued in 1896 and 1910, and to set itself above the law and the principles that govern a court of equity in the granting of equitable relief. The question presented is not whether the United States may have these lands if it needs them, but whether it may dispossess the petitioners without paying for their lands.

The trial court held, following the *Irwin* case, that the lands in controversy were not a part of Mare Island, were not embraced within the Castro grant (R. I—261), and had passed to the State under the Swamp Land Act (R. I—259). The trial court further held that as to the patents which were issued 34 and 20 years before the suit was brought the action was barred by the federal six-year statute of limitations, U.S.C., Title 43, §1166 (R. I—278), the case being ruled by the decision of this Court in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U.S. 447 (R. I—169). The court further indicated, without deciding (R. I—169-176), that the position of the government was so grossly inequitable that the court would not grant equitable relief.

The Circuit Court of Appeals for the Ninth Circuit, one judge dissenting, reversed. Rejecting the holding of the trial court and the decision in the *Irwin* case alike, two of the judges held that by virtue of the confirmation decree the lands should be taken to be within the Castro grant and therefore did not pass to the State under the Swamp Land Act. (R. V—154-158) The majority further held, in plain disregard of the *Chandler-Dunbar* decision, that the federal six-year statute of limitations was not applicable (R. V—161-162), though the case is obviously within the exact language of the statute:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U. S. C., Title 43, § 1166)

And finally, though the court was sitting as a court of equity and though the result was admittedly inequitable, —indeed, was so grossly inequitable that the concurring opinion suggested Congressional remedial action (R. V—166)—the court concluded that it was powerless to stay its own hand from doing inequity (R. V—163-167). The holding of the majority is that the United States, unlike any other litigant, is free to come into a court of equity and demand, in a suit brought by it against its own citizens, that the court shall exercise its extraordinary equitable powers for the purpose of granting relief which is grossly inequitable and unjust.

As indicated, one of the judges dissented. In accordance with the *Irwin* decision, he held that the land was not a part of Mare Island and therefore passed to the State under the Swamp Land Act. (R. V—167-168)

To avoid possible confusion it should be said that while this case and *United States v. O'Donnell* (1938) 303 U. S. 501, are sometimes referred to as companion cases —because they both involve questions relating to the extent of Mare Island—the fact is that the two cases are concerned with different lands and the issues decided in the *O'Donnell* case are entirely different from those presented here. The title to the lands involved in the *O'Donnell* case was not adjudicated in the *Irwin* case; nor had the private claimants ever been in possession of the land; nor had they bought after or in reliance upon the government's patents. In the *O'Donnell* case the trial court found that the lands there involved were a part of Mare Island, whereas the finding here, by the same trial judge, is just the other way. Moreover, in this case, unlike the *O'Donnell* case, there was no concurrence by the courts below upon the finding. In that case the suit was brought within the period of the statute of limitations, while here one of the patents was 34 years old and another was 20 years old when suit was brought. In the *O'Donnell* case the equities were all with the government—here it is conceded in the concurring opinion that the result of the majority's decision is so "grossly inequitable" as to warrant Congressional remedial action.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged by petitioners are that the United States Circuit Court of Appeals for the Ninth Circuit erred

(1) In holding that it was free to ignore the adjudication of the identical title involved in this case and to refuse to follow the decision in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

(2) In holding that the federal six-year statute of limitations (U. S. C., Title 43, §1166) does not apply to the swamp land patents which were issued in this case 34 and 20 years, respectively, before suit was brought.

(3) In holding that, when the United States comes into a court of equity as a litigant seeking equitable relief against its patents, it is entitled to a preferred position over private litigants and is not subject to the ordinary principle that a court of equity will not do inequity.

(4) In holding that the United States may not be estopped, however unjust and inequitable its claim may be.

(5) In holding, contrary to the finding of the trial court supported by compelling evidence, that the lands in suit were a part of Mare Island and were embraced within the confirmed Castro grant.

V.

SUMMARY OF ARGUMENT.

The argument of petitioners may be summarized as follows:

1. The title to the identical lands here involved was previously adjudicated in an action against an officer of the federal government, who defended upon the basis of the same claim of title in the United States as that made here. It was there held that the United States had no title and that the lands had passed to the State under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. That adjudication stood unchallenged for a period of 40 years prior to the bringing of this suit, during which time it was respected and relied upon by everyone having anything to do with the matter. Upon the strength of that decision the lands were patented to the State and thereafter hundreds of thousands of dollars were invested by petitioners in purchasing and improving the land, all with the knowledge of the government. Upon the plainest principles of justice, and pursuant to the settled rule of *stare decisis*, the Circuit Court of Appeals was duty-bound to follow the earlier decision, as the trial court did, and erred in refusing to do so.

2. Swamp land patent No. 72, which the government asks be cancelled, was issued in 1896 or 34 years before this suit was brought and swamp land patent No. 152, which the government also seeks to cancel, was issued in 910 or 20 years before this suit was brought. As to these

patents the suit is plainly barred by the federal six year statute of limitations. Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166) *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447.

3. In this case the United States has come into a court of equity, seeking affirmative equitable relief against its own land patents. The circumstances of the case are such that granting the relief thus sought would be unjust and inequitable in the extreme. Indeed, one of the majority below, though concurring in the reversal of the trial court, was so impressed with what he said was the "grossly inequitable" result that he suggested there should be Congressional relief. Petitioners contend that the United States, like any other litigant, is subject to the governing principles of equity and cannot have affirmative relief in equity which is grossly inequitable.

4. The circumstances of this case are such as clearly give rise to an equitable estoppel. The holding of the court below that the sovereign may not be estopped is contrary to the repeated decisions of the federal courts.

5. The trial court, in passing upon the merits of the case, found that the lands here involved were not a part of Mare Island, were not granted to Castro and were not embraced within the confirmation decree and hence did not belong to the United States. This holding—which accorded exactly with the decision of Mr. Justice Field and Judge Sawyer in the *Irwin* case and with the views of Judge Mathews in this case—is supported by the great weight of the evidence. The majority below, without rul-

ing that the lands were in fact a part of Mare Island or were in fact granted to Castro, have set aside the trial court's finding upon the ground that the lands were embraced within the confirmation decree. In so doing they have not only disregarded the express mandate of Rule 52(a) of the Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous," but have misconstrued the confirmation decree and brought about a result that is so harsh as to be unconscionable.

ARGUMENT.

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN THE *IRWIN* CASE, IN WHICH THE TITLE TO THE IDENTICAL LANDS WAS ADJUDICATED. THE COURT BELOW ERRED IN REFUSING TO FOLLOW THE EARLIER DECISION.

We are here concerned with land titles emanating from the federal government, upon which patents have issued. This Court has on more than one occasion remarked upon "the immense importance and necessity of stability of titles dependent upon these official instruments".[1] The importance is, of course, greatly enhanced when it appears, as it does here, that prior to the issuance of the patents, the identical title was adjudicated, especially when the case was carried to the highest court in the land. Such

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[1] *United States v. Maxwell Land-Grant Co.* (1887) 121 U. S. 325, 381; *United States v. Stinson* (1905) 197 U. S. 200, 204.

adjudication, long acquiesced in as it was in this instance, becomes a rule of property—a rule of the particular title—from which the courts are not free to depart.[1] The refusal of the court below to be guided by this principle gives rise to a question of the utmost importance, affecting, as it does, many land titles.

From early days this Court has recognized and frequently applied the general principle of *stare decisis* in cases involving land titles. In a comparatively recent case this Court held that the rule must be applied, even against the United States and even though the United States was suing on behalf of Indian wards of the government. In *United States v. Title Insurance & Trust Co.* (1924) 265 U. S. 472, the United States, as guardian for certain Mission Indians, sought to quiet title to a perpetual right of the Indians to occupy, use and enjoy lands which were part of a Mexican land grant that had theretofore been confirmed and patented to others by the United States. The Indians had not presented their claim to the Board of Land Commissioners for confirmation. Some twenty-three years earlier the Supreme Court had decided that, in the absence of presentation of a claim for confirmation to the Board of Land Commissioners, the Indians had no

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[1]To avoid any misunderstanding of our position, it should be said that we recognize that the *Irwin* decision, although rendered in a litigation against an officer of the government, is not *res judicata* as to the United States in view of such decisions as *Carr v. United States* (1879) 98 U. S. 433, and *United States v. Lee* (1882) 106 U. S. 196. Those cases, however, do not involve the principle upon which we rely here—which is that after an adjudication of the identical title has been allowed to stand for many years, so that those dealing with the title have purchased and made their improvements in reliance upon the adjudication, the courts will, in later litigation, adhere to the earlier decision.

right of possession, use or occupancy.[1] In the subsequent case it was contended, just as the United States contends here and as in effect the majority of the Circuit Court of Appeals have held, that the earlier decision was wrong and should be departed from. In rejecting this contention and in holding and emphasizing the importance of adhering to the earlier decision this Court said:

> "The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago, and affected many tracts of land in California, particularly in the southern part of the state. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results. Besides the goverment and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as Minnesota Min. Co. v. National Min. Co., 3 Wall. 332, 18 L.ed. 42, this court said (p. 334): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are

[1] *Barker v. Harvey* (1901) 181 U. S. 481.

> retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.' "

This rule has particular, and we might add peculiar, application where, in the subsequent litigation, the identical title is again involved. As many courts of last resort have held, it would be intolerable if the same title, after having been adjudicated by a highest court and the adjudication's having stood for many years, were to be open to re-adjudication. As this Court pertinently observed in the quotation given above,

> " 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open'." (265 U. S. 486)

To illustrate this principle as applied to cases involving the identical title, it suffices to refer to a few cases which, in their essential aspects, approach the facts of the case at bar. In *Ingoldsby v. Juan* (1859) 12 Cal. 564, the California Supreme Court adjudicated the title to certain lands, the title to which turned upon the validity of a deed made by Donna Martina Castro to her children. Some years later, in the case of *Hihn v. Courtis* (1866) 31 Cal. 398, an attempt was made to relitigate the validity of this same deed as it affected the title to the same land, just as here the United States seeks to re-adjudicate the scope and effect of the confirmation decree. There, as here, the contention was that the previous decision was wrong and

should not be followed. The court, in an opinion[1] which we commend to this Court, held that although the principle of *res judicata* did not apply, the matter was no longer open to reconsideration, saying (p. 402):

> "That decision has become a rule of property with reference to this land, and many parties may have purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former adjudication under such circumstances, because a majority of the present court might arrive at a different conclusion from that attained by their predecessors—men equally well qualified to discern, and equally conscientious in the pursuit of the right, would be to trifle with the rights of litigants and bring merited obloquy upon the administration of justice.
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> "There was an adjudication on the identical deed—the identical title—eight years ago, and important rights may, and probably have, been acquired on the faith of that adjudication. If after a lapse of so long a term this adjudication could now be properly disturbed, in the language of Mr. Fearne, before cited, 'Even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security.' It could, in fact, hardly be called a 'temporary security.' For these reasons we

[1] It is interesting to note that the opinion was written by Associate Justice Lorenzo Sawyer who later, as United States Circuit Judge, participated with Mr. Justice Field in the decision of the *Irwin* case. Moreover, the decision was concurred in by Associate Justice Rhodes, who was appointed special counsel for the Government in the *Irwin* case.

decline to re-examine the grounds of the decision in *Ingoldsby v. Juan,* and without intimating any opinion as to the correctness or incorrectness of the conclusions attained, adhere to it in this case on the principles of *stare decisis.*"

A very illuminating application of the rule is afforded by two decisions of the Supreme Court of Michigan. In *Winans v. Willetts* (1917) 197 Mich. 512, the rights of the parties turned upon the question whether Winans Lake was in point of fact navigable or non-navigable, just as this case turns upon whether the lands were a part of Mare Island and within the confirmed Castro grant. The Supreme Court of Michigan held that the lake was non-navigable. Some nine years later the identical question arose in *Pleasant Lake Hills Corporation v. Eppinger* (1926) 235 Mich. 174. It there appeared that the corporation, relying upon the former adjudication, had acquired the Winans lands and had expended some $170,000 in improvements. The defendants sought to relitigate the question of title to the lake. Mr. Justice Fellows, who dissented in the earlier case, wrote the opinion of the court and squarely ruled that the title could not be re-adjudicated. He said:

"The writer of this opinion did not then agree with the opinion of the court in that case and wrote in dissent. But it is unimportant what his views then were or now are. We think it is likewise unimportant what views any or all the members of the court as now constituted entertain. Every reason for the application of the doctrine of stare decisis demands that this court accept the holding of the court in that

case as final. The property involved is the same. The rights asserted are the same. In reliance upon the decision in that case, plaintiff has invested $170,000. Every element of fair dealing with litigants requires us to recognize the doctrine of stare decisis, and as applied to the same property follow the decision in that case. If it is to be ever overruled, it should be in a case involving other property than that specifically passed upon there."

The same principle was applied by the Supreme Court of Michigan in *St. Helen Shooting Club v. Carter* (1929) 248 Mich. 376, where the Court followed its earlier decision in *St. Helen Shooting Club v. Mogle* (1926) 234 Mich. 60.

The Supreme Court of Tennessee has very forcefully announced the same principle. In *Burr v. White Oak Lumber Co.* (1924) 149 Tenn. 191, the question of title turned in part upon the validity of a tax deed, which the trial court held to be valid. It appeared, however, that some 27 years previously the Supreme Court of Tennessee, in the case of *Darrow v. Wright,* held the identical tax deed to be void, just as in the *Irwin* case it was decided that the confirmation decree did not cover the lands here in suit. The Supreme Court of Tennessee held the failure to follow the earlier decision was error, saying:

"We are of the opinion, however, that the validity of this tax sale is not an open question in Tennessee.

* * *

"A title previously passed upon, although in a suit between different parties, ought not to be again con-

troverted and examined in a case presenting the same question upon the same facts.

* * *

"So we think that the decision in Darrow v. Wright established a rule of property as to the land covered by the tax deed from B. Lee to Freddie Matson. This decision became the law of the Matson title, and we are not willing to disturb it after 27 years.

"Although there was no written opinion in Darrow v. Wright, the decree was none the less effective to declare the law of that title. It was necessarily relied on by everyone who examined the title to any portion of this land and purchased any portion thereof."

In the case of *Fisher v. Lott* (1908) 33 Ky. L. 609, the question of title turned upon the provisions of a will. Some 43 years previously the same will had been before the court. It was contended that the former adjudication was wrong and should not be followed. The Court of Appeals of Kentucky held, however, that the question was not open to re-examination, saying:

"Whatever doubt we may have had concerning the construction placed upon this clause of the will is resolved in favor of that consistency which ought to prevail in the opinions of the court concerning identical matters, particularly where the title to real estate is involved, and upon the faith of which previous opinion the public may have been led into a sense of security in trafficking in these titles, relying upon the presumption that, when once authoritatively construed by the court of last resort of the state, that construction is conclusive."

We forbear further citation. The rule, as well as the reason for it, must be plain.

The title to the lands now in controversy was adjudicated in the *Irwin* case against the identical claims that are now made by the government that those lands were a part of Mare Island and were within the Castro grant and were confirmed by the decree of the Board of Land Commissioners. All of these claims were met and answered by Mr. Justice Field, then sitting in circuit. The case was carried to the Supreme Court of the United States by counsel for the government, where the judgment was affirmed. It was following that judgment that the lands were acquired by Dr. Cross and thousands upon thousands of dollars were spent in their reclamation and improvement. The case here is much stronger than the usual one for the application of the rule, in that the government's own law officers conducted the litigation and carried it to this Court. Since that time all of the officers of the government having authority to deal with the land have regarded that decision as conclusive,—as, we submit, propriety required they should. The land was patented to the State of California, in the name of the President of the United States himself, upon the strength of that decision. And all of the present owners bought their lands and erected their improvements after the patents had issued. If ever there was a case calling for the application of the doctrine of *stare decisis* surely this is it.

The principal majority opinion suggests (R. V—164) —as apparently affording a ground for departing from

this decision of 40 years' standing—that more exhaustive investigations have disclosed facts which were not before the court in that case and, adopting the thought, the government makes the same point in its brief opposing certiorari (Govt's. Br. p. 12). It is first to be noted that were this true, it would afford no ground for departing now from the *Irwin* decision. The quotations from the authorities we have reviewed above make it clear that possible error in an earlier adjudication affecting land titles is no ground for not following that adjudication in later litigation. Indeed, the whole purpose of the rule is to protect those who rely upon a final adjudication by a court of last resort against a later departure because of possible error. Otherwise, there would be no occasion for a rule of *stare decisis* at all.

It is next to be noted—and we speak with deference—that there is nothing to support the statement that more exhaustive investigations have disclosed that "the true facts were not before the court" in the *Irwin* case. Nor are the implications of the further statement

> "that the facts respecting tidal conditions obtaining on the island were at least within the possibility of knowledge on the part of claimants willing to take note of those conditions or desirous of investigating the available evidence" (R. V—164)

warranted. The implications of these observations by the court below, to state them bluntly, (first) that petitioners and their predecessors were either negligent in failing to make adequate investigations or were deliberately unwilling to go into the facts, and (second) that had they shown

due diligence they would have discovered that the facts upon which the *Irwin* case was decided were erroneous and that the *Irwin* decision could not be relied upon. With due respect to the court below, we urge that these suggestions are wholly without justification.

In the case at bar the facts have been exhaustively investigated, both by the government and by petitioners. Certainly those investigations meet the most exacting tests of diligence suggested by the court below. Those investigations revealed the facts shown by the record here. And, far from disclosing that the true facts were not before the court in the *Irwin* case, those investigations confirm that the *Irwin* case was correctly decided upon the facts as they actually existed.

To be specific,—the critical point, as indicated by the decision below, is as to whether the tule lands to the northwest of the high and dry land of Mare Island were above ordinary high-water mark. The record here affirmatively shows that on that question Mr. Justice Field had before him an accurate survey made by the United States Coast and Geodetic Survey showing, as do all maps pretending to any accuracy, that from the high and dry land north, including the so-called isthmus or "neck", all of the lands were, just as we have admitted them to be, above ordinary high-water mark. Petitioners' Exhibit 17 in this case (R. II—658, IV—49) is actually a photostatic reproduction of defendants' Exhibit U in the *Irwin* case, as the notation appearing in the upper right-hand corner of the map shows. And, as appears upon its face, the map

was specially prepared for the United States Attorney for use in the *Irwin* litigation, obviously to show the very fact that these lands were above ordinary high-water mark. Moreover, Swamp Land Survey 569 must have been before the court in the *Irwin* case and that survey likewise shows (R. II—648, IV—37) all of the tule lands northwest of "Mare Island" to be above the line of mean high-water. The most exhaustive investigations show, therefore, that Mr. Justice Field had the true facts before him when he decided the *Irwin* case.

Nor can the *Irwin* case be explained away upon the ground, which the opinion below implies and as the government has expressly argued in its brief opposing certiorari (Govt's. Br. p. 12), that Mr. Justice Field based his decision that the lands in Swamp Land Survey 569 had passed to the State under the Swamp Land Act upon the erroneous assumption that those lands were below ordinary high-water mark. Had those lands been below ordinary high-water mark they would of course have been tide-lands and, as such, would have passed to the State, not under the Swamp Land Act, but by virtue of its sovereignty. *Pollard v. Hagan* (1845) 3 How. (44 U. S.) 212. This rule as to tide-lands was familiar law to Mr. Justice Field who, as Chief Justice of California, wrote the opinion in *Teschemacher v. Thompson* (1861) 18 Cal. 11 dealing with the precise question of the State's ownership of tide-lands and who, as Associate Justice of the United States Supreme Court, wrote this Court's opinion in *Weber v. Board of State Harbor Commissioners* (1873) 85 U. S. 57, in which it was held that upon the admis-

sion of California into the Union absolute property in and dominion over all lands under the tide-waters within its limits passed to the State by virtue of its sovereignty.[1] That he had this precise rule in mind in the *Irwin* case appears from his statement that "The shore, which belongs to the public, is the line between that mark"—ordinary high-water mark—"and low-water mark, over which the daily tides ebb and flow" and that under neither the common law nor the civil law "could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides." (28 Fed. 713) It is plain, therefore, that Mr. Justice Field did not, and in view of his knowledge of the law could not have based his decision in the *Irwin* case upon the erroneous assumption that the lands here in suit were below mean or ordinary high-water mark.

Nor is it true as intimated in the majority opinion below (R. V—165) and as argued in the government's brief opposing certiorari (Govt's. Br. p. 17) that the rights of those claiming under the State have from the beginning been shrouded in doubt and uncertainty and, absent an adjudication of title to which the government was a party, those claiming under the State were not entitled to rely upon the government's own solemn patents. As to the matter of doubt and uncertainty, while it is true that prior to this Court's decision in the *Irwin* case, the question of title was in doubt, from the time of that decision in 1890

[1]This same result was reached in the case of *Mumford v. Wardwell* (1867) 6 Wall. (73 U. S.) 423, 436, in which Mr. Justice Field participated.

down to the filing of this suit by the government there was no doubt or uncertainty whatever. As we have said and as the record shows beyond any possibility of dispute, private parties and government officers alike have—as we respectfully assert they should have—regarded that decision as final. The record is barren of any dissent from or question of it.[1]

As to the suggestion that, absent an adjudication of title to which the government was a party, petitioners and their predecessors were not entitled to rely upon the patents,—surely it cannot be the law that after this Court has passed upon and adjudicated a particular land title, those dealing with that identical title are to regard the matters thus adjudicated as being still unsettled.[2] Nor should it be the rule, as the opinion below implies, that official patents of the United States are nothing more than precarious quit-claims, conveying only a speculative title. On the contrary, where, as in this case, patents have issued after a decision of this Court that title has passed from the government, those patents should be deemed conclusive.

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[1]None of the cases cited in the government's brief opposing certiorari (p. 17), with the sole exception of the *Irwin* case itself, had anything to do with the lands involved in this case—all of them dealt with Mare Island proper or with the swamp lands in Survey 34. Those cases do show that the government's claim of title under the Castro Grant, even as to those other lands, was in doubt, as justly it should have been after it successfully repudiated that grant and caused it to be held to be a forgery in *Bouldin v. Phelps* (1887) 30 Fed. 547. There is nothing whatever in any of those cases to show that there was any doubt as to the title to the lands in Survey 569 after this Court decided the *Irwin* case. The statement to the contrary is wholly without support.

[2]It scarcely need be added that private persons, dealing with land titles, have no way of obtaining an adjudication to which the government is a party, inasmuch as the United States cannot be sued without its consent.

Otherwise, purchasers have no protection whatever in dealing with titles emanating from the government.

Under the rule of *stare decisis* the *Irwin* decision should now be followed. That rule has for its underlying principle those considerations of equity and justice which urgently call for application here.

II.

THE ACTION IS CLEARLY BARRED BY THE FEDERAL STATUTE OF LIMITATIONS AS TO THE PATENTS WHICH WERE 34 AND 20 YEARS OLD WHEN SUIT WAS BROUGHT.

After the decision of this Court in the *Irwin* case the government issued patents to the State of California covering all of the lands involved in this suit. Swamp land patent 72 was issued in 1896, 34 years before this action was brought, and swamp land patent 152 was issued in 1910, 20 years before. As to those two patents the action is plainly barred by the federal six-year statute of limitations, Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166), which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."

The case is, of course, within the exact language of this statute. The government has claimed, however, and a majority of the court below have held, that the statute does not apply where the Land Department did not have jurisdiction to issue the patent and, so it is said, there was

no jurisdiction here because the lands were within the confirmed Castro grant. Aside from the fact that that question has, as we have seen, been concluded by the *Irwin* litigation and, as we shall later see, the evidence conclusively shows that these lands were not within the confirmation decree, this Court has held that a claim of want of jurisdiction in the Land Department affords no defense or exception to the statute. This point was directly ruled upon in the leading case of *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, in an unanimous opinion written by Mr. Justice Holmes.

In the *Chandler-Dunbar* case the patent under attack purported to be issued upon a scrip location. After the patent had issued the government claimed, just as it does here, that the patent was absolutely void because the Land Department had no jurisdiction, the land having been reserved at the time of patent. It is obvious that if the land was in fact reserved at the time of patent, as the government claimed, it was just as much beyond the jurisdiction of the Land Department as would be the case of land embraced within a confirmed Mexican grant. This Court declined to pass upon the question whether the land was in fact reserved, holding that, assuming it was, none the less the patent was protected by the statute and should be held to be good. The ruling upon this point is contained in two paragraphs of the opinion and is so important that we quote:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion

that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L.ed. 789, 795, 17 Sup. Ct. Rep. 368. *The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect.* It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued', it describes the purport, and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599, 17 L.ed. 261.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605, 17 L.ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L.ed. 532, 12 Sup. Ct. Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L.ed. 1067, 1071, 24 Sup. Ct. Rep. 692. *This statute*

> *must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place.* See United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L.ed. 789, 795, 17 Sup. Ct. Rep. 368."

The majority below have sought to read into the statute an exception that finds no warrant either in the language of the statute itself or in the decisions of the courts. Specifically, the majority have said:

> "It is settled that the 1891 act has reference only to patents issued for lands open to disposition through the general land office. It is 'strictly a part of the public land laws.'" (R. V—161)

With deference to the court below, we respectfully submit that this statement is not correct. It is not only not "settled" that the act has reference only to patents for lands open to disposition by the General Land Office, but in our view this Court has expressly settled the rule to be otherwise. In *United States v. Coronado Beach Co.* (1921) 255 U. S. 472, 488, this Court held the act applicable to patents issued in confirmation of Mexican land grants in California and certainly Mexican land grant lands are not, as the court below phrases it, "open to disposition through the general land office". Nor does the *Coronado Beach* case stand alone,—it has repeatedly been followed by the lower federal courts, where certiorari has been denied. See *Hogan v. United States* (C.C.A. 9th Circ. 1934) 72 F. (2d) 799, 806-807, cert. den. 295 U. S. 752; *Putnam v. Ickes* (C.A.D.C. 1935) 78 F. (2d) 223, 227-228, cert. den. 296 U. S. 612.

Moreover, we respectfully submit that the court below has misapplied the phrase "strictly a part of the public land laws" which it quotes from *United States v. Minnesota* (1926) 270 U. S. 181, 196. Had the full sentence from which this phrase was taken been quoted the import of the decision would have been plain. What this Court there said was:

> "The provision in the Act of 1891 has been construed and adjudged in prior decisions—which we see no reason to disturb—to be strictly a part of the public land laws and without application to suits by the United States to annul patents, as here, because *issued in alleged violation of rights of its Indian wards and of its obligations to them. Cramer v. United States, supra,* p. 233; *La Roque v. United States,* 239 U. S. 62, 68; *Northern Pacific Ry. Co. v. United States,* 227 U. S. 355, 369."

The portion of the quotation which we have italicized indicates what the true holding was and lends emphasis to the language of the *Chandler-Dunbar* case quoted at pages 33-35, *supra.* The true rule is this: where the interests of the United States alone are concerned the statute applies—where interests of others are involved those interests are not subject to the bar against the government.[1] Neither the court below nor the government

[1] This is evident from the language of *Cramer v. United States* (1923) 261 U. S. 219, cited by the Court in the quotation above, where this Court said (at page 233):

> "The object of the statute is to extinguish any right the *government** may have in the land which is the subject of the patent, *not to foreclose the claims of third parties.* * * * After the lapse of the statutory period, the patent becomes conclusive *against the government,* but not against the claims and rights of others, * * *."

*Emphasis not ours, but the Court's.

has cited nor have we found a case where, the interests of the United States alone being involved, this Court has held the statute not to apply. The statute plainly covers cases such as this and, as pointed out by the Court in the *Chandler-Dunbar* case, should be given effect accordingly.

The court below (R. V—162) and the government in its brief in opposition to the granting of certiorari here (Govt's. Br. p. 15) seek to distinguish the *Chandler-Dunbar* case by saying that in that case there was a statute authorizing the Land Department to dispose of the particular lands there involved, whereas here there was not. This attempted distinction is unsound, because the supposed premise upon which it is based lacks foundation in fact. In the *Chandler-Dunbar* case, as well as in this one, the Land Department was, if the claim of the government were to be accepted, completely without jurisdiction to issue the patent,—in the former case because the lands were reserved, in the latter because the lands were within a Mexican land grant and therefore not included in the Swamp Land Grant. Obviously, if, as claimed by the government in the *Chandler-Dunbar* case, the lands were in fact reserved, there was no statute authorizing their disposition by the Land Department. To avoid this dilemma the government says, however, that, but for the reservation—i. e., except for complete want of jurisdiction—the lands were of a kind that the Land Department was authorized to dispose of. To which we rejoin that, if such reasoning is to be followed, it may equally be said in the case at bar that except for the fact (were it the fact) that the lands were embraced within a Mexican land grant,—i. e., again, except for the fact

making for want of jurisdiction,—the lands were precisely of the kind described in the Swamp Land Act and therefore were patentable by the Land Department.

The *Chandler-Dunbar* case is clear authority that though the Land Department may not have jurisdiction, if the interests of the United States *alone* are concerned the statute of limitations constitutes congressional authority for a patent which has been issued and outstanding for the statutory period. Such patents are, as this Court said, "to be held good". In this case the interests of the United States alone were involved—it is not even suggested that there are any outstanding interests, aside from those of petitioners—and therefore, in the language of Mr. Justice Holmes—"The United States had the power to make it (the patents) or to validate it (them) when made" and "the statute, which is the voice of the United States, had that effect."

Not only is the case at bar squarely within the principle and authority of the *Chandler-Dunbar* case, but to an unusual degree it presents a case within the mischief aimed at by the statute. Here the Land Department had the problem of determining the limits of the Castro Grant—because all of the swamp land outside of the Castro Grant was within the Swamp Land Act and patentable to the State. To guide it in its determination the Land Department had a decision of the United States Circuit Court for California, affirmed by this Court, that these identical lands in fact lay outside of the Castro Grant and had passed to the State under the Swamp Land Act. To make assurance doubly sure the Land De-

partment had the word of the Navy Department that it no longer claimed the lands. (Exs. 27 to 29, R. II—693-698, III—232-238, IV—50) Surely, under such circumstances it is not extending the plain intent of the statute—much less its express language—to hold that after the statutory period not only has run, but has run several times over, bona fide purchasers, such as petitioners, are to be protected.

The seriousness of the consequences of the ruling of the majority below is apparent. There must be literally hundreds of thousands of land titles founded upon swamp land patents. If the holding below be correct, no title under the Swamp Land Act is protected by the statute of limitations. No such title is secure from attack by the United States, no matter how belated. It may appropriately be asked—Is there any reason of public policy requiring that the statute be emasculated by reading into it an exception such as that suggested by the majority below? Clearly not. Every consideration of policy underlying statutes of repose applies to swamp land patents. This Court pointed out in *Wright v. Roseberry* (1887) 121 U. S. 488, 496, that in California alone nearly 2,000,000 acres passed to the State under the Swamp Land Act. It would be intolerable if, after patents had issued for these lands and purchases had been made in reliance upon them, just as occurred in this case, the resulting titles could be upset no matter how great a time had elapsed since the patents had issued.

By the *Chandler-Dunbar* decision the statute has been definitively construed to cover just such a situation as this

case presents. The statute itself contains no such exception as that sought to be read into it by the Circuit Court of Appeals. There is no decision of this Court supporting such an exception. As a matter of policy no such exception is required or warranted.

It is submitted that this action is clearly barred by limitations as to swamp land patents 72 and 152 and that the Circuit Court of Appeals erred in not so holding.

III.

THE COURT BELOW ERRED IN HOLDING THAT WHEN THE UNITED STATES COMES INTO A COURT OF EQUITY SEEKING AFFIRMATIVE EQUITABLE RELIEF IT IS NOT SUBJECT TO THE ORDINARY PRINCIPLE THAT A COURT OF EQUITY WILL NOT DO INEQUITY.

The outstanding feature of the decision of the majority below is the grave injustice of the result that has been reached. The decision in this respect is conspicuous. That the result is unjust is not merely our characterization of it; the majority who pronounced the judgment have themselves expressly recognized this fact. The principal majority opinion asserts that assuming the existence of the equities contended for by petitioners, the matter is beyond the sphere of judicial authority and relief must be had by way of legislative action. (R. V—166) The Circuit Judge who concurred did so, as he frankly said, "despite the grossly inequitable result," adding that "It is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court." (R. V—166) We have, therefore,

the unusual spectacle of a decree of a court of equity which is confessed by those who made it to be most inequitable and unjust. We respectfully submit that in holding that the United States may have affirmative equitable relief notwithstanding the gross injustice of its claim, the majority have departed from the uniform rule of decision and from the usual and accepted principles of equity.

The facts show the entire lack of equity in the government's case.

As early as the late '60s application was made to the State for the purchase of the lands in controversy here as swamp and overflowed lands and in 1874 they were patented to petitioners' predecessor. (Ex. 5, R. II—651, III—185) Soon a controversy developed between the private land owners and the Commandant of the Mare Island Navy Yard and in 1883 the *Irwin* suit was started, in which petitioners' predecessors alleged their ownership of the swamp lands in Survey 569 and their exclusion therefrom by Irwin, who was the Commandant. (R. III —287-290) The government's claim of title (R. III—305-310) was set up by the government's own attorneys (Ex. 20, R. I—177, II—667, III—203) and was adjudged adversely to the claim now made by the United States. While this litigation was proceeding, the government was also litigating in another suit against the Commandant of the Navy Yard a claim by one Bouldin and others to the lands embraced in the Castro Grant under a chain of title out of Castro prior to the government's. The government's attorneys successfully met the issue in that case by proving that in point of fact the Castro Grant was void

as a forgery. *Bouldin v. Phelps* (1887) 30 Fed. 547.[1] In 1890 this Court handed down its decision in the *Irwin* case, affirming that title to the lands here in controversy was not in the United States, but had passed to the State under the Swamp Land Act.

We have then, by 1890, an adjudication of this identical title by this Court. We also have the fact that the government's attorneys had proved in court that the Castro Grant was fraudulent and void.

With the matter of the title to these lands thus seemingly finally settled, actual reclamation and use of the land by the private owners proceeded, with full knowledge and acquiescence by the government and appropriate affirmative action upon its part. The facts have been stated in some detail at pages 8-11, *supra*. Suffice it to say here that Dr. Cross bought Island No. 1 in 1895 and leveed it and reclaimed it at great expense. The lands were consistently taxed to their private owners from 1882 on. (R. II—645) They were sectionized and platted and then patented by the United States. As the years went on the lands changed hands and finally came into the ownership of your petitioners. Every one of them, without exception, bought after patents had been issued by the United States, in reliance on the *Irwin* decision of many years before. Petitioners themselves have expended in excess of $300,000

[1] It is interesting to compare the defense put up by the government's attorneys before the Board of Land Commissioners, where they had no interest to defeat the Castro Grant, with the defense they put up in the *Bouldin* case, when the title was really at stake. The *Bouldin* decision shows plainly enough the results of a real effort to test out the validity of the grant.

in the acquisition and improvement of the lands, exclusive of any moneys spent by their predecessors.

The action of the Land Department was consistent with that of the Navy Department, which in view of the *Irwin* decision made no claim to these lands. (Ex. 37, R. II—707, III—260-265) Ever since 1914 the Navy Department has maintained the present navy yard fence, which excludes all of the lands in controversy here. (R. II—188) Indeed, in 1913 the Commandant of the Yard filed in the office of the County Recorder of Solano County an official map of the lands embraced within the Navy Yard Reservation, in accordance with the act of the California legislature ceding jurisdiction of lands occupied by the United States for military purposes or defense (Cal. Stats. 1895, p. 51) and, again, this map covered none of the lands involved in this litigation. (Ex. 9, R. II—652-653, IV—38)

Notwithstanding all this, the government contends that the United States is now free to come into a court of equity and, without offering to do equity or make restitution, repudiate all that has gone on before, including its own patents which were freely issued, and take from petitioners the lands which they and their predecessors have so long held and, at such great expense, made valuable. Manifestly, no private person could prevail in a court of equity upon a claim so barren of equity or justice. No private person could move a court of equity to exercise its extraordinary powers to bring about such a wanton result.

The decision of the majority below poses this important question—When the United States comes into a court of

equity seeking equitable relief, is it entitled to a preferred status, so that it may have affirmative relief regardless of its inequity? May the United States, unlike any private litigant, have relief that is plainly unjust? Upon this point there should be but one answer and we think that it is afforded by all of the cases.

The case we have here is not one, as suggested in the concurring opinion below (R. V—166), of mere laches or non-action upon the part of the government. We have far more than mere delay, as the facts heretofore cited show. We have a definitive decision as to this identical title by this Court. We have the repeated affirmative action of the Land Department, conforming with that decision. We have the repeated affirmative action of the Navy Department, likewise conforming with that decision. This affirmative action has been relied upon, as necessarily it would be, by everyone dealing with the title to these lands.

The decision of the majority below not only reaches an over-all result that is essentially grossly unjust, but we have here the phenomenon of a court of equity figuratively throwing up its hands and declaring that it is without power to stay its own action in perpetrating this injustice. So far as we are aware, the decision below stands alone as a declaration by a court of equity of its inability to do equity. The decisions are numerous and practically in accord upon the proposition that when the United States comes into equity seeking affirmative relief it does so upon the same footing as other litigants (except as to laches and limitations) and that even at the instance of the United

States a court of equity will not decree that which is plainly inequitable and unjust.

In *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, this Court, in a suit in equity, declined to decree a transfer of stock in defendant bank held by the estate of a deceased paymaster to satisfy the government's statutory priority, where, under the bank's charter, the bank had the right to be paid the indebtedness due it before transfer of the stock, the holding being:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States v. Mitchell, 9 Peters, 743, have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject." (35 U. S. 614)

In *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321, in denying the government relief where it sought to set aside land patents as against a bona fide purchaser, this Court said:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions." (200 U. S. 339)

In *American Propeller etc. Co. v. United States* (1937) 300 U. S. 475, this Court, in rejecting the government's contention that it was entitled to interest upon a counterclaim, said:

"We have said (*United States v. The Thekla*, 266 U. S. 328, 339-340, 341)—'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it * * * the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law." (300 U. S. 478)

Surely it is not holding the government up to too high a standard to require that, in suits brought by it against its

own citizens, it shall be held to have agreed "that justice may be done with regard to the subject matter".

The expressions of the Court which we have quoted are not mere occasional sporadic statements of an exception to the general rule, but indicate a consistent course of decision, enunciating what is the usual and accepted principle. They find their counterpart in numerous decisions of the lower federal courts. A few citations will suffice to illustrate.

In *United States v. National City Bank* (C. C. A. 2nd Circ. 1936) 83 F. (2d) 236, certiorari denied 299 U. S. 563, it was held that the United States, seeking in equity to recover a bank deposit as assignee of the Russian government, is subject, like any other litigant would be, to a claim of set-off, the court saying:

> "The United States suing, having no more rights than its assignor, is subject to that set-off. When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases." (83 F. (2d) 239)

In *United States v. Devereux* (C. C. A. 4th Circ. 1898) 90 Fed. 182, it was held that after long delay the United States could not enforce a trust deed given to secure certain judgments, where the property had come into the hands of innocent purchasers, the court saying:

> "It was suggested in argument that as the United States in this case comes into court claiming rights as cestui que trust under a deed between private parties, and asserting these rights as a private individual would, the case does not involve any governmental right or duty; that, therefore, the ordinary

rules controlling courts of equity as to laches should be enforced. This position cannot be maintained. The United States do not and cannot hold property as a monarch may for private or personal purposes. Van Brocklin v. Tennessee, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (U. S. v. Insley, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confided; nor are they bound by any statute of limitations (U. S. v. Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006).

"With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties." (90 Fed. 186)

In *Mountain Copper Co. v. United States* (C. C. A. 9th Circ. 1906) 142 Fed. 625 it was held that the United States would be denied injunctive relief against fumes of a copper smelter which had destroyed timber and vegetation on public lands, where similar relief would be denied a private person, the court saying:

"It is the well-established law that, when the government comes into a court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." (142 Fed. 629)

In *The Falcon* (D. C. Md. 1927) 19 F. (2d) 1009 the government was denied relief against a tug which was

alleged to have been responsible for a collision because during the four years' delay in bringing suit, the tug had passed into hands of innocent purchasers against whom it would have been inequitable to grant relief. It was there said:

> "There is, indeed, an element of estoppel against the United States involved in the facts of the case at bar, by reason of its failure to act for a period of two years after the injury was suffered, and its seeming acquiescence in the sale of the tug. Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity. While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity, and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." (19 F. (2d) 1014)

In *United States v. Flint* (C. C. Cal. 1876) 25 Federal Cases 1107, #15,121, the government was denied relief, upon equitable grounds, against a decree of confirmation alleged to have been obtained by fraud, the court saying:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings, but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. * * * And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.

* * *

> "All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." (25 Fed. Cas. p. 1113)

In *United States v. Dominion Oil Co.* (D.C. Cal. 1917) 241 Fed. 425, the government was denied a temporary injunction and receiver as to oil lands within a presidential withdrawal upon the ground that a private litigant could not have such relief, the court saying:

> "I conceive it to be clearly established, both upon reason and authority, that the government, in such a case as this, and even under circumstances so persuasively in its favor, possess no higher or different rights than a private individual seeking similar relief would possess. The fact that the securing or conserving of oil as a fuel for its navy, whereby it may properly defend or even perpetuate itself, is involved, does not add to its rights in this court nor change its character as a suitor. What it may do because of military necessity through its executive branch does not concern us here." (241 Fed. 427)

The court below has, we respectfully submit, erred in not giving effect to the rule of these cases. Its decision gives the government a status, as a party litigant in equity, to ask and receive relief that is grossly inequitable. That the government does not enjoy such a status and that it may not have relief that is against all conscience is attested by the cases cited.

Upon general principles of equity the court below should have denied the government the relief sought in this case.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE GOVERNMENT IS NOT SUBJECT TO EQUITABLE ESTOPPEL.

The facts previously reviewed (pp. 8-12, 41-43, *supra*) make out a clear case of equitable estoppel. As we read the principal opinion below (R. V—163-166), the essence of the holding is, not that the facts at bar are insufficient to establish a case of equitable estoppel, but that upon some supposed principle of public policy the sovereign is not subject to the defense. This holding is in direct conflict with the repeated decisions of the federal courts and, we respectfully submit, is not the law.

Undoubtedly the leading case in this country upon the subject of equitable estoppel as against the sovereign is the decision of the Eighth Circuit Court of Appeals in *Iowa v. Carr* (C. C. A. 8th Circ. 1911) 191 Fed. 257. The question there was whether the sovereign, the State of Iowa, was estopped to claim certain lands which, but for the element of estoppel, were owned by it as a portion of the bed of the Mississippi River uncovered as a result of a sudden avulsion. The facts making for an estoppel were much less extreme than those presented here. The court nevertheless held that the sovereign was estopped to set up its claim of title. The opinion contains such an excellent discussion of the whole subject and such an able review of the leading authorities that we quote the following for the convenience of the Court:

> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay

does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. United States v. Stinson, 197 U.S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 67 C.C.A. 1, 10, 131 Fed. 668, 677; United States v. Chicago, M. & St. P. Ry. Co. (C.C.) 172 Fed. 271, 276; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C.C.A. 221, 222, 223, 233, 234, 236, 237; United States v. Stinson, 125 Fed. 907, 910, 60 C.C.A. 615, 616; Herman on Estoppel, §§676, 677; State of Michigan v. Jackson, L. & S. R. Co., 16 C.C.A. 345, 351, 69 Fed. 116; 122; State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N.W. 103, 106; United States v. California & Oregon Land Co., 148 U.S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; Carr v. United States, 98 U.S. 433, 438, 25 L. Ed. 209; United States v. Walker (C.C.) 139 Fed. 409, 411, 412, 413; United States v. Willamette Valley & C. M. Wagon Road Co. (C.C.) 55 Fed. 711, 717; Attorney General v. Central Railway Co., 68 N.J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a void law after the city has been exercising its assumed powers for only four years, but has levied and collected taxes

and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state. State v. City of Des Moines, 96 Iowa, 521, 532, 533, 65 N.W. 818, 31 L.R.A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. Commonwealth v. Bala & Bryn Mawr Turnpike Co., 153 Pa. 47, 25 Atl. 1105; State of Wisconsin v. Janesville Water Power Co., 92 Wis. 496, 66 N.W. 512, 515, 32 L.R.A. 391; State v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N.W. 422, 427, 14 L.R.A. (N.S.) 336; State v. School District No. 108, 85 Minn. 230, 88 N.W. 751; Attorney General v. Delaware & Bound Brook R.R. Co., 27 N.J. Eq. 1; 24; People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067, 1068, 44 L.R.A. 122; Vermont v. Society for the Propagation of the Gospel, 2 Paine (C.C.) 545, Fed. Cas. No. 16,920. According to the decisions of the highest judicial tribunal of the state of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof, by acquiescing in the possession, occupation and improvement of it, or of a part of it by a citizen who claims title thereto by possession and estoppel only. Corey v. City of Fort Dodge, 118 Iowa, 742, 749, 92 N.W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. Smith v. City of

Osage, 80 Iowa, 84, 89, 45 N.W. 404, 8 L.R.A. 633; Dillon on Corporations, §533; Audubon County v. Emigrant Co., 40 Iowa, 460; Page County v. B. & M. R.R. Co., 40 Iowa, 520; Austin v. Bremer County, 44 Iowa, 155; Adams County v. B. & M. R.R. Co., 39 Iowa, 507.

* * * * * * *

"In State of Michigan v. Jackson, L. & S. R. Co., 16 C.C.A. 345, 346, 350, 351, 352, 69 Fed. 116, 117, 121, 122, 123, 50,000 acres of land were granted to the state as swamp lands by the act of Congress of September 28, 1850. But these lands were subsequently certified, and finally between 1869 and 1873 erroneously patented to a railroad company in supposed execution of a grant of the United States by the act of June 3, 1856, to the state to aid in the construction of railroads. Knowledge of the title of the state to these lands was, by the acts of Congress and the public records, equally open to all parties in interest. A railroad company to whom the lands were conveyed by the patentee built the railroad, in reliance upon the title evidenced by the patents, sold a part and still held a part of the land, when in 1887 the state of Michigan brought a suit in equity to remove the cloud of these patents and of the conveyances under them from its title to the land under the swamp land grant. The Court of Appeals of the Sixth Circuit dismissed the bill and said:

> "'The state cannot be permitted to say that it has slept during all this long period and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government, which has made it so magnificant a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And, while it is neces-

sary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights.'

"To the same effect on a similar state of facts was the decision of the Supreme Court of Michigan in State v. Flint & P.M.R. Co., 89 Mich. 481, 51 N.W. 103, 106.

"In United States v. Walker (C.C.) 139 Fed. 409, 412, 413, 420, Walker was a United States marshal from 1889 to 1893. During this time he presented in his accounts charges for services rendered by his deputies which he and the accounting officers supposed to be lawful, but which were in fact illegal. The United States allowed and paid these charges from time to time during the four years he held his office, knowing that a large portion or all the amounts so paid to him would be immediately paid over by him to his deputies in payment of their services, as it was. Five years after his accounts had been allowed and closed and after the expiration of his term as marshal, the United States presented to the Circuit Court a claim for the repayment of these amounts by Walker, but the court refused to sustain the claim and said:

" 'When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do

justice to the citizen or subject, as determined by the jurisdiction of the forum in like subject-matter between man and man.'" (191 Fed. 266-269)

The court finally concluded, even as the court below in this case should have concluded:

> "There is no equity in the claim of the state against the plaintiffs in this case, it does not appeal to the conscience, it is met by an equitable estoppel, it was not presented or prosecuted with reasonable diligence, and a court of equity may not sustain it." (191 Fed. 270)

In *United States v. Denver & R.G.W. R. Co.* (C.C.A. 8th Circ. 1926) 16 F. (2d) 374, the United States was held to be estopped to recover certain right-of-way lands in view of the inequity of its claims, the court saying:

> "The equitable claims of a state or the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim or be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim". (16 F. (2d) 376)

In *United States v. Chandler-Dunbar Water Power Co.* (C.C.A. 6th Circ. 1907) 152 Fed. 25[1], it was claimed, even as it is claimed here, that the patent under attack was issued in excess of jurisdiction from the Land Department and therefore should be cancelled. The Circuit Court

[1] Affirmed in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, upon the ground that the suit was barred by the federal statute of limitations. See discussion, pages 33-35, *supra*.

of Appeals for the Sixth Circuit indicated, however, that relief should be denied upon grounds of equitable estoppel, saying:

> "Following the ancient common-law maxim, 'nullum tempus occurrit regi,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. 40-41)

The subject is so thoroughly and ably covered in *Iowa v. Carr* that we forbear further citation. That case has repeatedly been cited and followed. The rule it announces is not only good law, it is good common sense.

The opinion below refers to a number of decisions by this Court in support, so it is claimed, of a rule that the United States may not be estopped. We respectfully submit that those cases do not stand for any such general proposition and that an examination of them will disclose that in none of them would a private individual, upon the facts, have been estopped.

The case principally relied upon is *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389. In that case the power company was using certain lands in a national forest reservation and claimed that it had the right to use them without obtaining a license or permit from the Secretary of the Interior. As stated by this Court:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress, or, at their option, to remove from the government lands." (243 U. S. 403)

There was no showing that it would have been inequitable to require the power company to obtain the necessary permit and to pay the fees required by law. On its behalf it was claimed that when the forest reservations were created and understanding was had, as this Court stated, with "some unmentioned officers or agents of the United States" to the effect that the reservations would be no obstacle to the construction and operation of the company's works under a statute which required no license or permit. It was also claimed that agents of the United States forest service, who had knowledge of the company's construction work, made no objection until after the works were completed and in operation. Upon these facts this Court held, and most properly, that the government was not estopped to require the power company to obtain the required permits and licenses. Obviously, upon such a state of facts no private litigant would

have been estopped. The case presents no parallel to the one at bar and certainly is not authority for the general proposition that the United States is not subject to a plea of equitable estoppel.

The other cases cited in the opinion below are even less in point. *Lee Wilson & Co. v. United States* (1917) 245 U. S. 24, presented these facts: In surveying a certain township in Arkansas the government surveyor showed by a meander line the existence of a lake the lands under which, of course, he did not survey. In point of fact there was no lake in the township, the meandering being the result either of fraud or mistake. Later, when the error was discovered, the General Land Office ordered the previously unsurveyed area to be surveyed and sold. The defendants had purchased lands bordering upon the meander line and by reason of that fact claimed riparian ownership of the lands indicated upon the plat as the lake. Since there was in fact no lake upon the ground, it was impossible that the defendants could, as a result of their occupation of the land, have relied upon any supposed riparian rights in the non-existent lake. This Court's entire discussion of the issue of estoppel is the following:

> "C. The assertion that an estoppel against the United States arose from the fact that the administrative officers of the government, before the discovery of the fraud or error as to existence of the lake, had treated the area meandered as subjected to the riparian rights of the abutting owners under the state law, and consequently not subject to be disposed of by the United States, in substance but disregards the right to correct such error conclusively

> recognized as existing in the administrative offices of the Land Department by the decisions which we have previously cited." (245 U. S. 31).

It requires no exposition to show that such a case is no authority for the proposition that the government may not be estopped.

Jeems Bayou Fishing and Hunting Club v. United States (1923) 260 U. S. 561, also cited in the opinion below, is similar to the *Lee Wilson* case. There, in making a survey the government surveyor showed the southwest quarter of the section as fractional and depicted it as a peninsula jutting out into a lake. This supposed peninsula purported to be surveyed by courses and distances. In point of fact there was no such peninsula and, as this Court observed, the omission from the survey of the lands in the supposed peninsula was the result of such gross and palpable error as to constitute in effect a fraud upon the government. The Court held, in line with the holding in the *Lee Wilson* case, that the unsurveyed lands could be surveyed and sold. The entire discussion of the issue of estoppel is contained in the following excerpt from the Court's opinion:

> "But it is asserted that plaintiff is estopped from claiming title to the land because of certain correspondence with the Commissioner of the General Land Office, in 1897, wherein that officer said that there were no unsurveyed lands in the locality in question, and because of an official letter from the director of the Geological Survey to the same effect. It is clear, however, that the United States cannot be estopped. Lee Wilson & Co. v. United States, 245

U. S. 24, 62 L. ed. 128, 38 Sup. Ct. Rep. 21; Utah Power & Light Co. v. United States, 243 U. S. 389, 408, 61 L. ed. 791, 818, 37 Sup. Ct. Rep. 387." (260 U. S. 564)

It must be evident that upon the facts there disclosed the United States could not be estopped. Those facts would fall far short of creating an estoppel against a private litigant.

Finally, the opinion below cites *Cramer v. United States* (1923) 261 U. S. 219. That was a suit brought by the government on behalf of certain Indian wards to cancel a patent issued under the Railroad Act of 1866, upon the ground that certain of the lands embraced within the patent at the time of the Act were and ever since had been occupied by these Indians and therefore were excepted from the railroad grant. This Court held that the patent could be cancelled as to the lands actually occupied by the Indians. With respect to the issue of estoppel the whole discussion in the opinion is this:

> "Neither is the government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians, with the implied consent of the government, had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the government was under the circumstances, unauthorized, and could not bind the government; much less could it deprive the Indians of their rights. See and compare Lee v. Munroe, 7

Cranch. 366, 3 L. ed. 373; Whiteside v. United States, 93 U. S. 247, 257, 23 L. ed. 882, 885; Dubuque & S. C. R. Co. v. Des Moines Valley R. Co., 109 U. S. 329, 336, 27 L. ed. 952, 954, 3 Sup. Ct. Rep. 188; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 291, 46 L. ed. 1164, 1170, 22 Sup. Ct. Rep. 920." (261 U. S. 234)

The *Cramer* case plainly does not stand for any general proposition that the United States may not be estopped. Manifestly, in that case there was no basis for an estoppel in view of the fact that the Indians had been in the actual possession of the lands and had enclosed them,—facts which must have been known to those dealing with the land.

It is submitted that none of the cases cited in the opinion below is an authority that in a case such as we have here the United States may not be estopped. On the contrary, *Iowa v. Carr* and the other decisions to which we have referred affirmatively show that the government may be estopped.

We respectfully urge that the court below erred in holding that as a matter of law the defense of equitable estoppel was not available against the government.

V.

UPON THE MERITS, THE EVIDENCE PLAINLY SHOWED THAT THE LANDS IN SUIT WERE NOT A PART OF MARE ISLAND, WERE NOT GRANTED TO CASTRO AND WERE NOT EMBRACED WITHIN THE CONFIRMATION DECREE, AND THE COURT BELOW ERRED IN OVERTURNING THE TRIAL COURT'S FINDING TO THAT EFFECT.

The decision of the majority below is not only inequitable and unjust—upon the facts it is wholly uncalled for. As the dissenting opinion makes clear (R. V—167-169), the whole matter should be disposed of by construing the confirmation decree as it is written—and as it was construed by the trial court—as embracing only the lands called Mare Island.

We are not unmindful that ordinarily a question of fact is not available upon certiorari. Where, however, such a question goes to the very root of the matter we believe it is open to this Court to dispose of the cause by determining the fact issue. More especially is this true where, as here, the court below has usurped a field not allotted to it, and, in total disregard of Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous", has upset a finding supported by the great weight of the evidence.[1]

The trial court expressly found that the lands in suit were never known as or referred to as or by the name of Mare Island, that they were not a part of Mare Island and were not embraced within the Castro Grant nor within the decree of confirmation of the Board of Land

[1]Compare *National Labor Relations Board v. Waterman S. S. Corp.* (1940) 309 U. S. 206, 207-209.

Commissioners. (R. I—261) These findings, if supported by the evidence, are conclusive of the entire controversy. That they are supported by the overwhelming weight of the evidence appears from the record.

The government in its brief opposing the granting of certiorari claims (Govt's. Br. p. 12) and the majority below have in effect held (R. V—154), that, whatever the facts may have been as to the true extent of Mare Island or as to what was in truth granted to Castro, the decree of the Board of Land Commissioners confirming the Castro Grant covers the lands in controversy here and is therefore conclusive in favor of the government. The argument necessarily stands or falls according to whether the government's construction of the confirmation decree, adopted by the majority below in defiance of the findings and in direct conflict with the results of the *Irwin* case, is or is not supportable. It is submitted that, in the light of the facts of record, the construction is plainly wrong and cannot be sustained.

The issue here is the scope and effect of the confirmation decree, so we turn to the language of that decree. The entire decree (omitting the title and signatures) is as follows:

> "In this case after hearing the proofs and allegations, it is adjudged by the Commission that the claim of said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.
>
> "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (R. V—70)

The Court will note that the second paragraph alone describes what is confirmed. That description contains two separate references or calls: one for the place that "is called 'Isla de la Yegua' or Mare Island" and the other for an island "bounded by the water's edge". The question presented is—Do these two calls conflict and, if they do, which one is to control?

The only land ever known as or called Mare Island is the high and dry land which bears that name on the maps. See map opposite page 3 *supra* and discussion at pages xvii-xxviii of the appendix. Even the majority opinion below does not assert that any other land, particularly the land involved here, was ever called Mare Island.

Coming now to the second call, it is to be observed that the words "water's edge" are not words of art and have no precise meaning in law. Assuming they mean the ordinary water boundary, according to the Mexican law—which was the law of the grant—they would mean, as we shall see, the line of highest high-water throughout the year and, so construed, they would agree exactly with the first call, which embraces only the high land known as Mare Island. If, however, the words "water's edge" be construed to mean the common law line of ordinary high-water mark, as the majority below have held (R. V—155-156), then they would call for all of the lands now in controversy,[1] would expand the Castro grant more

[1]Even so construed they would not include that portion of the lands of petitioner James Irvine which lie to the north and east of Boat-Cut-off or Dutchman's Slough. The majority below have held these lands are not embraced within the confirmation decree and as to them they affirmed title in Irvine. (R. V—161, 166) The government has not sought to review this ruling.

than five fold and would create a direct conflict with the first call.

In this situation we are utterly at a loss to understand how it is that the majority below felt compelled to give the second call of the decree, construing it according to the common law, controlling effect. The majority have not held and upon the record could not hold that any of the land involved in this suit was ever called Mare Island or was ever known by that name. They simply treat this fact, and the first call of the decree as well, as being without relevancy. (R. V—157)

Nor have the majority below held that the Mexican authorities ever granted these lands to Castro. It is plain that under the Mexican law these lands did not pass by the grant. But the majority below have held that this, too, is of no consequence—the decree must be construed according to the common law and the line of ordinary high-water mark must be given controlling effect. (R. V—155-158) Assuming the decree must be construed according to the common law, yet when it appears, as it unmistakably does in this case, that so construing it results in a conflict in the calls of the description, there is nothing in the common law that says that the call which would make the decree erroneous and would confirm five times as much land as was granted must control over an equally positive call which is in accordance with the grant as made. The majority below have totally ignored the common law principle of construction, so well stated in 1 *Freeman on Judgments* (5th ed.) §76:

> ". . . of two interpretations of the language of the judgment, that one will be adopted which makes

it correct and valid, in preference to the one which would make it erroneous."

Lest our position be misunderstood, we wish to make it clear that we do *not* contend that the confirmation decree may now be attacked because of error. If the decree had stated unmistakably and unequivocally that the lands confirmed embraced all of the lands in suit, then, no matter how erroneous such a ruling would have been, it would nevertheless have concluded the matter. But where, as here, the description in the decree contains calls which, if we construe the second as the majority below have said it must be construed, are conflicting, the Court necessarily must construe the decree and resolve the conflict and it is elementary that that construction should be adopted which will make the decree correct and in accordance with the grant. Especially is this true where, as in this case, there is nothing in the proceedings before the Board to indicate any intention other than to confirm the grant as made.

This situation—of a conflict in the calls of a confirmation decree—is by no means a new one. In *United States v. De Haro* (1862) 25 Fed. Cas. 803, #14938, Judge Hoffman, who probably decided more Mexican land grant cases in California than any other judge,[1] had before him precisely this same situation,—of a confirmation decree with conflicting calls and a contention that the decree in fact confirmed more land than was granted. His holding was just what in our view the holding of the majority below should have been:

[1]See his published decisions entitled *Hoffman's Land Cases*.

> "If the language of the decree were explicit and unequivocal, it might be too late now to disturb it, notwithstanding that it might give to the claimants more than they asked for, or any of their witnesses pretended they were entitled to. But in so clear a case of mistake I consider it my duty to lay hold of any ambiguity or discrepancy in its language to enable me to restrict the confirmation to the land actually granted and occupied and claimed." (25 Fed. Cas. 805)

The courts have often been faced with the problem of construing instruments containing descriptions calling for a place by name and also giving some other conflicting call. For convenient reference we give a number of cases in the appended footnote where a call for a place by name, being correct and in accordance with the intention of the instrument, was held to control some other conflicting call, even one by specific metes and bounds.[1]

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[1] In *Parker v. Kane* (1860) 22 How. (63 U. S.) 1, the description read:

> "Lots one (1) and Six (6) being that part of the northeast quarter lying east of the Milwaukee river * * *"

and it was held that the call for the lots by number controlled the call for that part of the northeast quarter lying east of the Milwaukee River which embraced a considerably larger area.

In *Wise v. Watts* (C. C. A. 9th Circ. 1917) 239 Fed. 207, the description read:

> "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning" and so on by courses and distances "the said tract of land being known as Location No. 3 of the Baca Series * * *"

and it was held that there were three separate calls or descriptions and that the calls for the tract by name (i. e., as the tract granted to the heirs of

Upon the merits it is plain that the confirmation decree was intended to be consistent with the Castro grant and was intended to confirm the place "called Mare Island". The majority of the court below have erred in failing to give the decree that effect. This error not only results in a decree that is harsh and unjust, but results in a conflict with the decision in the *Irwin* case upon the identical question that tends to bring the judicial process into disrepute.

In our argument we have asserted that according to the Mexican law the grant to Castro was confined to the high and dry land of Mare Island and excluded all of

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Baca and as Location No. 3 of the Baca Series) controlled the metes and bounds description.

In *Piper v. True* (1869) 36 Cal. 606 the description was:

> "One undivided half part of all that certain tract or parcel of land situate, lying and being in the County of Contra Costa, in the State of California, known as the 'Rancho Canada del Hambre y las Bolsas', being the tract of land upon which the Town of Martinez is situated, and the same confirmed to said Teodora Soto by decree of the District Court of the United States for the Northern District of California, and surveyed by order of the Surveyor General of the United States for California, by A. W. Von Schmidt, Deputy Surveyor, in March, 1860, and approved by said Surveyor General; the said tract, according to said survey, containing thirteen thousand three hundred and twelve and seventy-one-hundredths acres of land; saving and excepting therefrom the piece of land now occupied and inclosed by the parties of the first part, * * *".

and it was held that there were five calls and that the calls for "Rancho Canada del Hambre y las Bolsas" and "the land confirmed by the District Court of the United States" were controlling.

In *Haley v. Amestoy* (1872) 44 Cal. 132, the description was:

> "All the undivided two thirds (2/3) of all the lands known by the name of 'Rancho de San Vicente,' lying and being situate in the County of Los Angeles, and State of California; the lands of said rancho being known and described as follows: to wit: Beginning" and so on by courses and distances,

and it was held that the call "Rancho de San Vicente" controlled the courses and distances.

the land in controversy here and that none of this land was ever known as or called Mare Island and hence was not confirmed by the confirmation decree. This Court is entitled to a showing that these assertions are supported by the record. For this purpose we have set forth in the appendix a review of the evidence on these points, with appropriate references to the record.

The decree of the Circuit Court of Appeals is erroneous and grossly inequitable. It should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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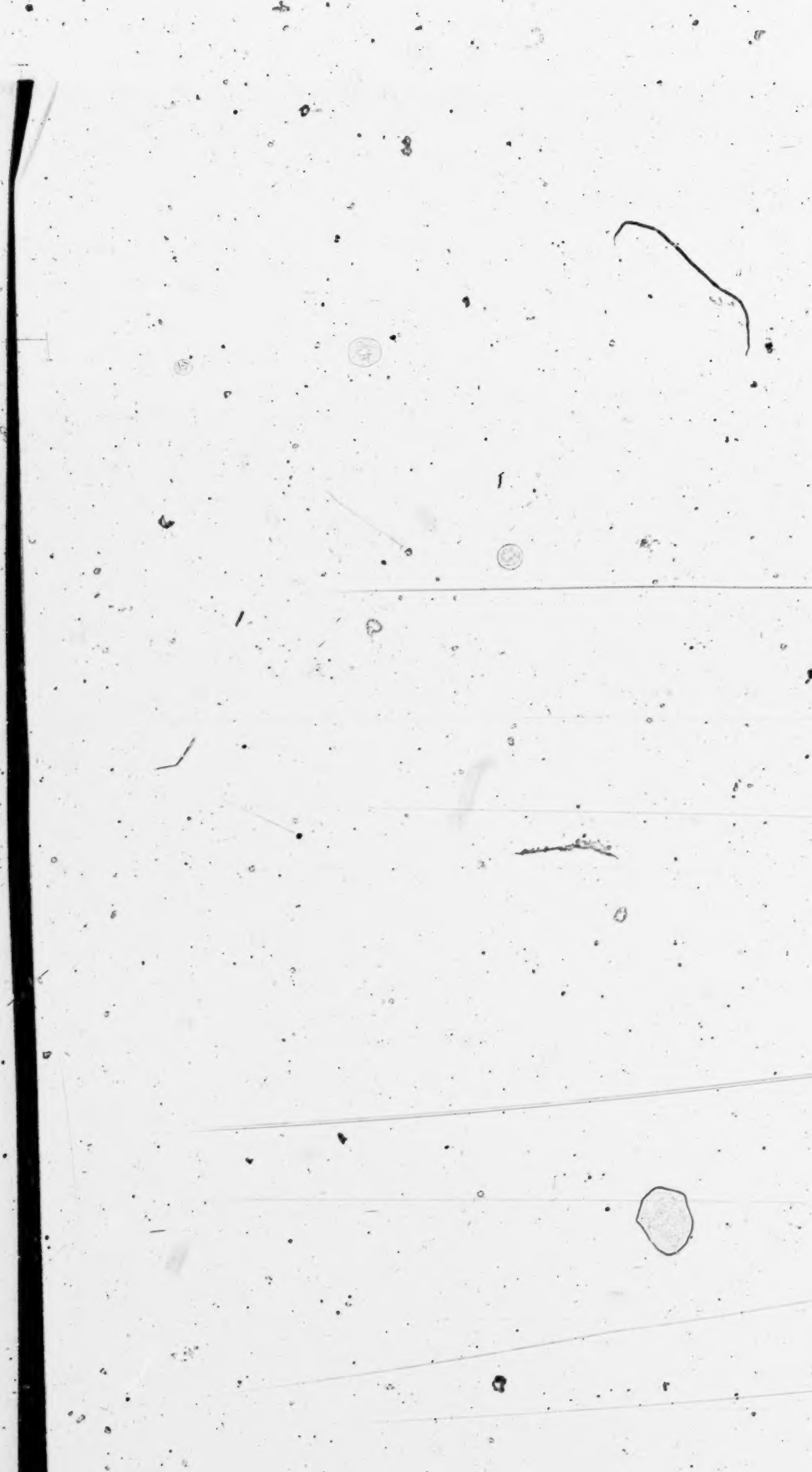
Dated: San Francisco, California,
March 11, 1942.



APPENDIX

A.

Under the Mexican law the Castro grant ran only to the line of highest high-water, which excluded all of the tule marsh to the northwest of Mare Island i

B.

The grant to Castro and the confirmation decree cover only the land called Mare Island, which excludes all of the land in suit xvii

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Appendix

A.

Under the Mexican law the Castro Grant ran only to the line of highest high-water, which excluded all of the tule marsh to the northwest of Mare Island.

In considering the scope and effect of the confirmation decree, it is both necessary and appropriate to take into account what in fact was granted to Castro.

> "It is always proper to consider what the judgment should have been, since it will be 'presumed that the court intended to adjudge correctly in law upon the facts of the case,' . . . "[1]

Inasmuch as the grant to Castro was made by the Mexican authorities under the Mexican law, our problem is, therefore, first to determine what, according to that law, would pass by a grant of an island and then to determine what, in the light of that law, actually passed to Castro. The record shows that under the Mexican law a grant to a private person of land bordering upon tide-water carries, not to the line of ordinary high-water mark as at common

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[1] *Freeman on Judgments* (5th ed.) Sec. 76. As Freeman further points out in Section 77:

> "In case of doubt regarding the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record. This is well illustrated in those cases in which the description of property in the judgment is supplemented and made certain in this manner. And the judgment will not be given a more extensive effect in this respect than is warranted by the record."

law, but only to the line of highest high-water throughout the year, and that in this case the isthmus or "neck" of tule marsh between Mare Island and the swamp lands in Survey 569 was well below the line of highest high-water and therefore the grant to Castro embraced none of Survey 569.

As to what the Mexican law was, we think there is no room for a reasonable difference of opinion. In *Borax Consolidated, Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, this Court in discussing the difference between the civil law, which prevailed in Mexico, and the common law authoritatively stated:

> "By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, title 1, §3; Dig. Lib. 50, title 16, §112. But by the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.'" (296 U.S. 22)

The federal courts take judicial notice of the Mexican law at the time when California belonged to Mexico. *Fremont v. United States* (1855) 17 How. (58 U.S.) 542, 557; *United States v. Chaves* (1895) 159 U.S. 452, 459; *Crespin v. United States* (1897) 168 U.S. 208, 212. For convenient reference, however, we produced expert testimony upon the point. Professor Max Radin, whose qualifications were not questioned (R. II—617-618), after translating the official laws of Mexico and quoting from the leading work on the subject, *Hall's Laws of Mexico*, testified:

> "Q. Will you kindly state to what line under the Mexican law which was in effect in 1840 and 1841 in

California, a grant of land made by the Mexican authorities would go where the grant is to the sea, or a bay, or strait, or other body of water as a boundary?

A. It would go to the highest high tide of the year.

Q. In case the Mexican authorities made a grant of an island, will you state to what line under the Mexican law that grant would go?

A. To the same line, in my opinion.

Q. And that was the law in 1840 and 1841, and during the entire Spanish-Mexican regime in California?

A. It was.

Q. And that would apply to grants made to private individuals under Mexican colonization laws?

A. There would be no difference applied to any branch.

Mr. Lipman: Take the witness.

Miss Phillips: No questions." (R. II—624)

The majority below have not doubted that this is a correct exposition of the Mexican law nor has the government produced any authority to the contrary. In view of this Court's expressions in *Borax Consolidated Ltd.* the applicable Mexican law may be deemed settled.

This brings us to the next question,—whether the swamp land to the northwest of Mare Island, particularly the narrow strip in the "neck", was below the line of highest high-water throughout the year and thus, under the Mexican law, cut Mare Island off from the swamp lands in Survey 569. Upon this question there is no con-

flict. The government's evidence, as well as our own, demonstrates that the tule marsh in the neck was below the line of highest high-water.

Two eye witnesses testified to the natural conditions as they existed prior to the time that the government leveed and reclaimed the swamp lands in the area of the neck. These were George Cross, son of Dr. Cross, who lived on and managed Island No. 1 or Cross Island for about nine years commencing in 1898 (R. II—526, 530, 532) and Frank H. Greene, who was an engineer employed by the government at the Navy Yard for about six years commencing in the latter part of 1897. (R. II—539, 546)

Witness Cross testified that he was familiar with the area to the northwest of Mare Island referred to in the record as the "neck" and that he had frequently seen it under water at high tide. (R. II—527-528, 532-536) Witness Greene testified that his principal duties at the Navy Yard were to supervise dredging operations (R. II—539); that he frequently had had occasion to observe the area referred to as the "neck" northwest of the machine shop (R. II—540-541) on account of the fact that a large amount of the spoil from the dredging operations was dumped there (R. II—541); and that when he was there at times of high tide he had seen the whole area under water (R. II—540). It may appropriately be added that the conditions in 1896 and later, as to which witnesses Cross and Greene testified, were less favorable for frequent overflow of the neck than were the conditions in 1841 or 1852 because, as both Captain Carlson and Lieutenant Smith testified, the natural process at this point has been

one of accretion and not of cutting or lowering. (R. II—523, 590-592)

The testimony of the eye witnesses was uncontradicted. The statement in the opinion below that the record leaves the matter substantially in doubt (R. V—155-156) has no support. Lieutenant Smith, of the Coast and Geodetic Survey, the government's expert map witness, expressly testified that there was nothing on any of the Coast Survey charts prior to 1900—i. e., prior to the government's reclamation work—that indicated that water had not gone over the neck in a broad sheet. (R. II—604-606).

Not only was the testimony of the eye witnesses uncontradicted, but the government's expert testimony shows to a point of demonstration that the conditions were precisely as the eye witnesses testified. The experts testified to the elevation of the swamp lands in the neck and they also put in evidence tide-gauge readings at Mare Island showing that, even in months of lowest tide, the water was frequently higher than the elevation of the neck and that therefore the water covered all of this land.

As to the elevation of the tule marsh in the neck, we first have the positive testimony of Captain Carlson, a Captain in the Corps of Civil Engineers of the Navy who served a number of tours of duty at the Navy Yard commencing in 1916 (R. II—557-558), that the elevation was at the minimum 2/3rds of a foot. When asked by his own counsel why he used that figure, he testified:

> "A. We actually found it by the survey and by also checking with the Sloat Board findings. They

> found the same average height along the marsh on the east side of the island." (R. II—582)

The testimony is, therefore, that the elevation was measured by actual survey and checked against the Sloat Board's report.

The Sloat Board's findings were made in connection with its extensive investigations of Mare Island and surrounding areas when the Navy Yard was originally laid out in 1852. (Ex. F—1, R. II—395, III—13, 26-34) In referring to their investigations of the tule marsh area on the easterly side of the Island toward Vallejo, the report says

> "... after boring through 6½ feet of this clay, sand stone was reached at 29½ feet below the surface of the tule, which is generally 67/100ths of a foot above ordinary high water." (R. III—31)

Plan No. 8 prepared by the Sloat Board to accompany the report was introduced in evidence as Exhibit F-2 (R. II—395) and has been reproduced in the record (R. IV—2) and shows at a number of points that the elevation of the tule marsh is only 67/100ths of a foot above ordinary high-water mark. Captain Carlson testified as an expert that these findings of the Board checked with his own studies.

Lieutenant Smith, the government's other expert, stated that none of the Coast Survey charts or surveys showed elevations, other than to indicate that the tule was above ordinary high-water mark. (R. II—487-488) He expressed the opinion, however, that the elevation of the marsh

was at least 1 foot. (R. II—606) He referred to some measurements which indicated that on a sand ridge the elevation was found to be 1.2 feet (R. II—607) and he finally concluded that the elevation "must have been approximately a foot." (R. II—608-609)

We have, therefore, as the government's evidence on this subject the testimony of Captain Carlson that the elevation was at a minimum of 67/100ths of a foot; this testimony is confirmed by the Sloat Board's findings; and we have the testimony of Lieutenant Smith that the elevation was approximately a foot. Whichever figure be taken to be correct, the readings of the tide-guage at Mare Island show that this was frequently below the line of the higher tides.

The tide-gauge readings consist of three sheets which were offered in evidence as the government's Exhibit R. (R. II—573, IV—21, 22 and 23) We reproduce them opposite the following page.

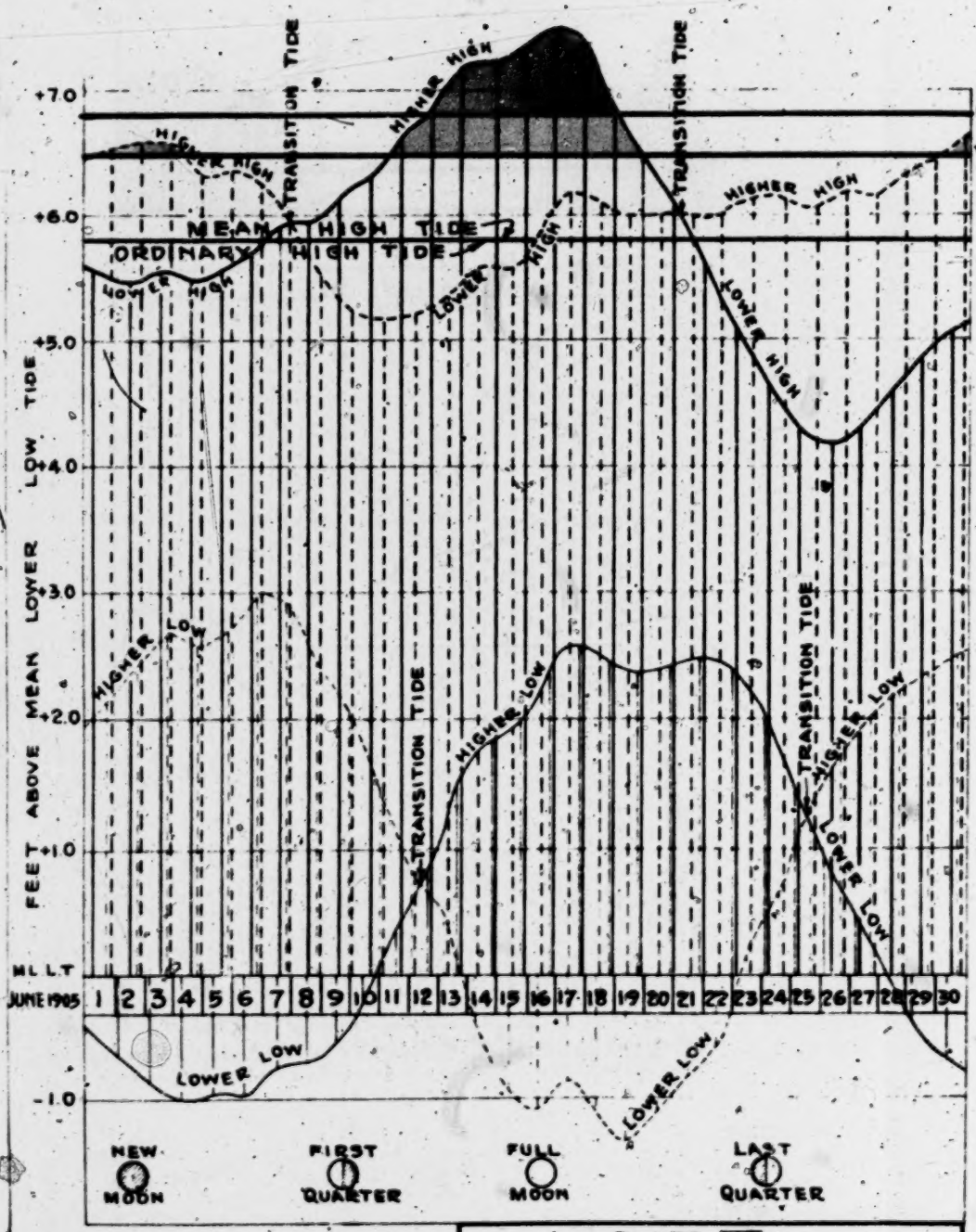
The Court will note the heavy black horizontal line marked and representing the line of "mean high tide" or "ordinary high tide" between elevations +5.0 and +6.0. It is at elevation +5.8, the testimony of Captain Carlson being that mean high tide at Mare Island has been established at 5.8 feet above the line of mean lower low water. (R. II—572) To show graphically how frequently the tule marsh was under water we have drawn one line 2/3rds of a foot above this "mean high tide" line and another 1 foot above that line. The areas colored in red indicate the times when the water was more than 2/3rds of a foot above mean high-water mark

and the areas colored in blue signify the times when the water was more than 1 foot above mean high-water mark.

The exhibit states that the month of November 1929 was selected because its tides were close to the long-time average. And yet in that month, accepting Captain Carlson's determination of the elevation of the tule marsh, water would have covered the neck on 13 separate days with one period of 7 consecutive days. If we adopt Lieutenant Smith's estimate of the elevation of the tule marsh, the neck would have been under water on 8 separate days, with a period of 6 consecutive days. And this is in an *average* month!

The month of February, 1905 was selected as showing relatively high water. In that month the tule marsh in the neck would have been under water no less than 20 days if we accept Captain Carlson's figure, with one period of 7 consecutive days and another of 13 consecutive days. On many of those days the water is shown going over the neck twice during the day. Even taking Lieutenant Smith's figure of 1 foot as representing the elevation of the tule marsh, the neck would have been under water on 12 separate days and on 3 of those days it would have been covered twice.

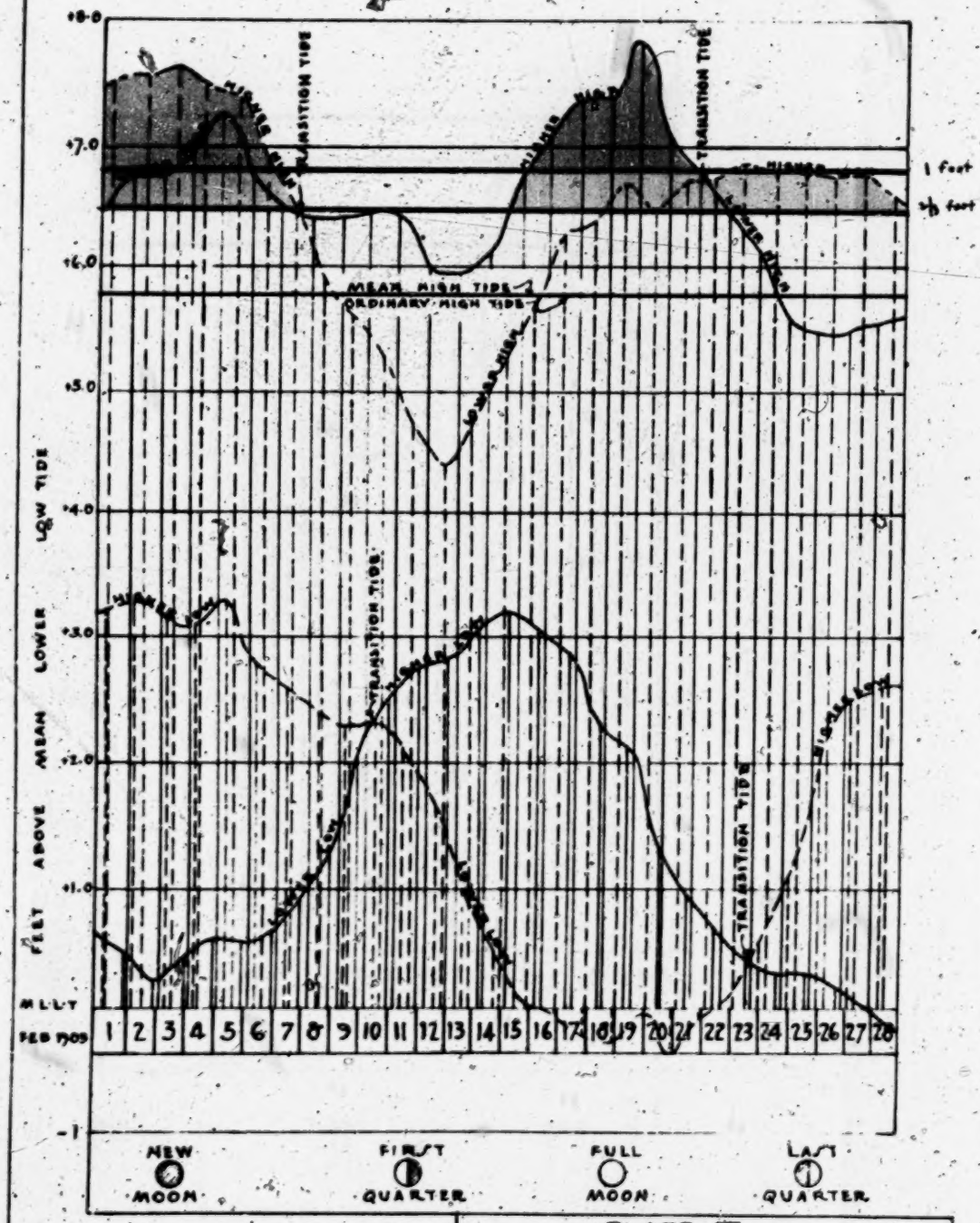
If we take an abnormally low month such as June 1905, we find that upon the basis of Captain Carlson's testimony the neck would have been under water on 9 consecutive days and if we take Lieutenant Smith's figure it would have been under water at high tide on 6 consecutive days.



NOTE :-
YEAR selected because prior to construction of training dikes in Mare Island Strait.
MONTH Selected because of unusually Low Tides

PLATE VII
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Dry Season Month of
JUNE 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENG'G. BLDG.)

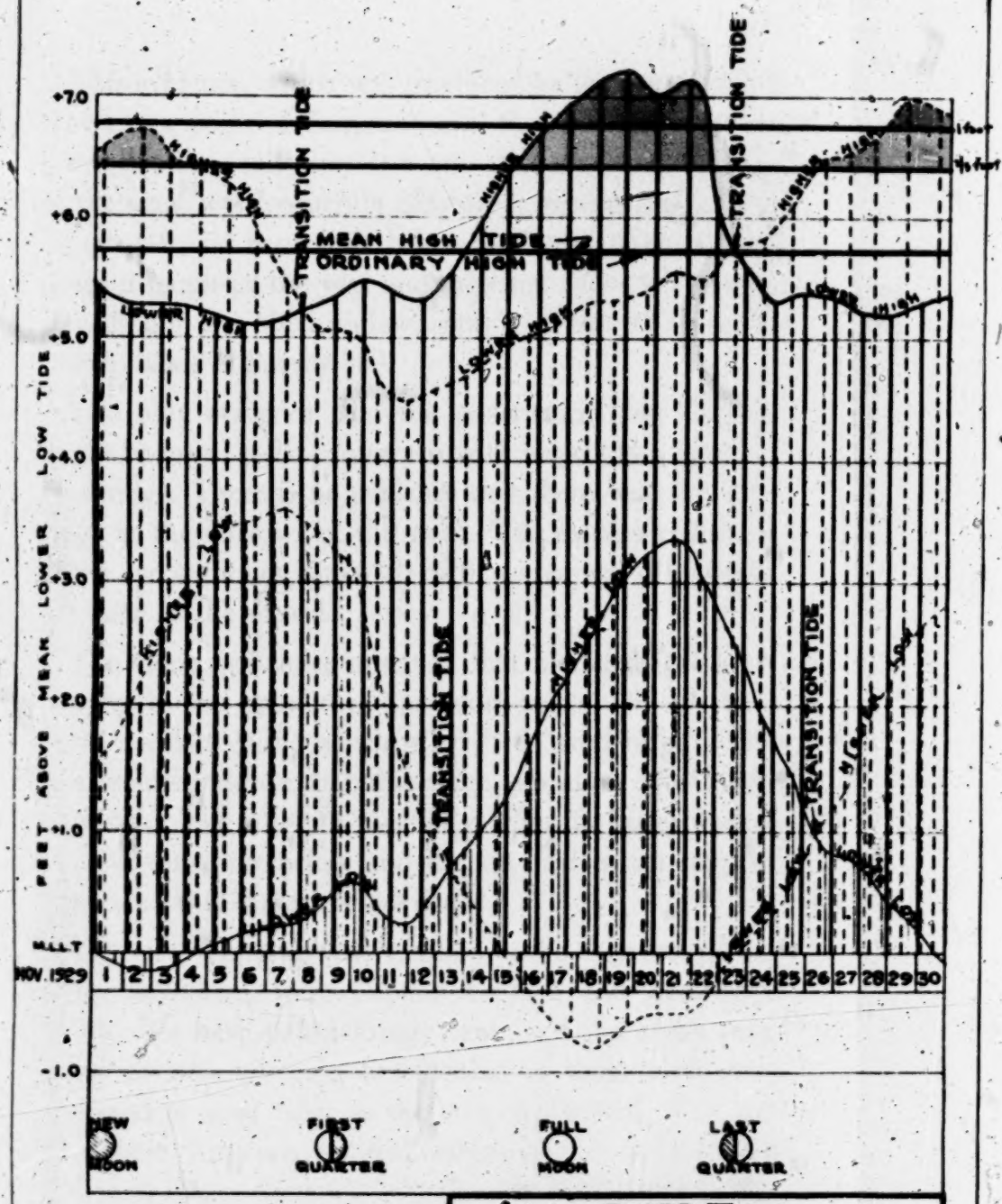
Compiled & Drawn by	Under Direction of
John F. Greathead Associate Civil Engineer Navy Yard, Mare Island, Calif.	C. A. Carlson Captain C.E.C., U.S. Navy of the Bu of Yds & Docks Navy Dept Washington D.C.



NOTE:-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually High Tides

PLATE VI
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Rainy Season Month of
FEBRUARY 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENG'G. BLDG)

Compiled & Drawn by:-	Under Direction of:-
John F. Greathead Associate Civil Engineer Navy Yard, Mare Island, Calif.	C. A. Carlson Captain C.E. U.S. Navy of the Bu. of Y.&D. Navy Dept. Wash. D.C.



NOTE:-
Month selected because its tides were close to long-time-average elevations

PLATE V
TIDAL REGIMEN
MARE ISLAND STRAIT
For the representative month of
NOVEMBER 1929
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENGG. BLDG.)

Compiled & Drawn by:
John P. Smethurst
Associate Civil Engineer
Navy Yard, Mare Island, Calif.

Under Direction of:
C. A. Carlson
Captain, C.E.C., U.S. Navy
of the Bu. of Yds. & Docks, Navy Dept., Wash. D.C.

This evidence, which was produced by the government, shows to a point of demonstration that the eye witnesses saw what they said they saw and that was that the area of the neck was frequently completely under water. This being so, it was necessarily below the line of highest-high-water throughout the year and therefore Mare Island was, according to the Mexican law, completely cut off from the swamp lands in Survey 569.

The only evidence that the government has claimed might be urged to be contrary is with respect to a so-called sand ridge. There is no evidence that there was any sand ridge at the narrows of the neck. The express testimony of the eye witnesses is that all of that area was tule marsh. We turn to the record.

The Court will have observed that in the diagram appearing in the opinion of the court below (R. V—149) there is a dotted line which is marked "sand ridge". This line would indicate that this ridge ran clear over to the high land. The diagram was taken from the government's brief in the court below and has no evidentiary support. We make this statement advisedly.

The only witnesses who testified to the existence of any ridge, *anywhere*, were Captain Carlson and Lieutenant Smith. We have painstakingly examined the entire testimony of both witnesses and neither of them testified to any sand or sand ridge in the area of the neck. The fact that these witnesses testified extensively as to the sand and sand ridges elsewhere (R. II—446-448, 559-568, 585, 602-603) but made no mention of a sand ridge at the narrows of the neck is not without significance.

The eye witnesses who did testify as to conditions at the neck—and their testimony relates to a time before the government filled in the land—were specific that the area was marsh land. George Cross, who knew this area as early as 1896 (R. II—524), testified:

> "Q. What was the condition of that area when you first knew it?
> "A. It was all marsh land." (R. II—527)

Frank Greene, who knew the area as early as 1897 (R. II—539), testified as follows:

> "Q. What was its condition when you knew it?
> "A. It was marsh land. At high tides the water went over it. Most of it was covered with what we call tules, a kind of weed that grows in salt water." (R. II—540)

This evidence is specific and uncontradicted. The government claims, however, that Exhibit T shows there was a sand ridge at the neck. This exhibit (R. II—586, IV—28) requires brief comment. The Court will observe that Station No. 48 on the exhibit is a profile taken at the narrow portion of the neck. There is marked upon this profile what purports to be a sand ridge. In so far as the profile shows a sand ridge at this point, it is in direct conflict with the testimony of Captain Carlson under whose supervision the exhibit was prepared and with the legend on the exhibit itself which states how the exhibit was made.

The cross-sections purport to give the elevations as they were actually found to exist in 1906, 1917 and 1931, and as they were *assumed* to have existed in 1852. (R.

II—579, 581-582) Captain Carlson testified that the lines indicating the assumed elevations of the marsh area in 1852 are not based upon any actual measurements made as of that time, but are based upon *assumed* conditions. (R. II—588-590) The line of 1852 was derived as follows: the Sloat Board's investigations, and apparently those made by Captain Carlson (R. II—582), disclosed that the marsh on the Napa Creek side was at an elevation of .67ths of a foot. Using this as a datum or starting elevation, the lines of 1852 were then drawn parallel to the profile lines of 1906, which were taken from the government's contour map prepared by Rousseau. (R. II —581-583) Rousseau's map of 1906 is expressly stated on Exhibit T to be the earliest contour map of the area in existence and presumably it was used because it was the earliest map showing conditions at the narrows of the neck prior to the leveeing and filling in of the area.

When we examine the profile at the critical Station 48 we find that the line of 1852 has not been drawn as Captain Carlson and the exhibit itself say it should have been drawn, but, without any evidentiary support, has been drawn to show a sand ridge. To be specific, the line of 1852 starts in on the easterly side, above the area marked "original low land", at precisely the same elevation as the line of 1906. Instead of paralleling the line of 1906, however,—as the exhibit itself and Captain Carlson said it should—it parallels the line of 1906 for a short distance and then suddenly departs from the parallel and goes up into a supposed sand ridge without a shred of evidence to warrant such departure. The 1906 line shows clearly

enough that there was no sand ridge there in 1906 and there is absolutely nothing in the record to show the existence of a sand ridge there prior to that date. Upon its face the exhibit is in error, as Captain Carlson expressly admitted it was in other particulars (R. II—613-615, 616-617), and is in direct conflict with his testimony.

Moreover, the exhibit is at war with the actual survey made by Rousseau in 1906. (Ex. S-1; R. II—576, IV—26) If the Court will look at this exhibit it will note that the levee erected by Dr. Cross is shown in bold outline on the map. The location of this levee in its relation to Mare Island may be seen by looking at the brown feathered line indicating the levee on the map opposite page 3 of the brief. The Court will observe that by dotted lines inside the levee a sand ridge is shown—though, even inside the levee, the sand ridge is not shown as continuous—whereas outside the levee, where more or less natural conditions obtained, no sand ridge is shown. Not only does Rousseau show no sand ridge outside the levee, but the elevations which he does show are considerably lower than the elevations reached by the higher tides as shown by Exhibit R.

We respectfully submit that there is no evidence that there was a sand ridge at the neck. The testimony of the eye witnesses that this area was frequently under water is uncontradicted and is demonstrated to be correct by the government's expert evidence. Certain it is that upon the record the trial court could properly have made no finding other than the one it did make,—that the lands in Swamp Land Survey 569 were not a part of Mare Island and were not granted to Castro. Under

the Mexican law Mare Island stopped at the northwesterly end of the high and dry land and did not include any of the lands involved in this case.

B.

The grant to Castro and the confirmation decree cover only the land called Mare Island, which excludes all of the land in suit.

We come now to a review of the evidence showing that none of the land in Survey 569 was ever known as or called Mare Island and hence was not included in the grant to Castro and was not confirmed by the confirmation decree. The very fact that none of this land was, under the Mexican law, a part of Mare Island explains why none of it was ever called by that name.

In determining the scope and effect of the call in the confirmation decree for the place "called 'Isla de la Yegua' or Mare Island" we shall refer primarily to the evidence introduced by the government. This evidence consists of a very large number of maps, many of them official ones published by the government, the official report of the Sloat Board and the confirmation proceedings themselves. This evidence all shows, without conflict or dispute, that the only area ever known as or called Mare Island is the high land which bears that name, as shown upon the map opposite page 3 of the brief.[1] In connec-

[1]The fact that Mare Island, the high land, was connected by a narrow neck of tule marsh with the lands in Swamp Land Survey 569 does not mean that the high land, and the high land alone, was any the less an "island", properly so called. While an island is usually entirely surrounded by water, it is a matter of common knowledge that the word

tion with the development of this point it is significant to note that the majority below have not disagreed with the trial court's finding that none of the lands in Survey 569 were ever known as or referred to by the name of Mare Island.

"island" is frequently used to describe a body of land, such as Mare Island, all or a portion of the boundary of which is marsh or swamp. This usage is not only sanctioned by good authority, but was particularly common in this vicinity where there are many bodies of land known or referred to as "islands" which are surrounded by tule marsh.

In no less an authority than

Encyclopaedia Britannica, 14th Edition, Volume XII, p. 715,

it is said:

> "The words 'island', 'isle' are sometimes used for a piece of land isolated during high tide or *surrounded by marsh*; e. g., Hayling Island, Isle of Ely."

Hayling Island, as the maps show, is a body of land off the south coast of England, just east of Portsmouth, and is connected with the mainland by a narrow neck of marsh, just as the government claims Mare Island was connected to the lands involved in this suit. As to the Isle of Ely, in Volume VIII at page 381 of the *Encyclopaedia* it is said: "Ely stands on a considerable eminence on the west bank of the Ouse, in the Isle which rises above the surrounding fens."

Also, we have many examples around San Francisco Bay of islands bounded by marsh. Our Exhibit 1, which is the State Geological Survey Map of 1873 (R. IV—34), shows Deer Island as a body of land surrounded by tule marsh to the north of Novato Creek, Simms Island similarly bounded by tule marsh to the south of San Rafael Creek, and another such island in the marsh to the north of Shoal Water Bay, which island is shown on the quadrangle map as "Green I". Similarly, in a publication entitled

Resources of Solano County,

published by the authority of the Solano County Board of Trade (1888), in the chapter dealing with topography, it is said:

> "Robinson's Island is upland rising out of the tule in Section Thirteen, in Suisun Township, and contains one hundred sixty acres of land. There are other small islands of upland rising from the swamp-land in different localities, Suisun at the head of Suisun Slough, on Section thirty-six, Township five North, Range two West, being located on hard land of this nature."

The islands referred to can be found upon the maps of the region, such, for example, as the State Geological Survey Map of 1873 and the quadrangle maps.

The Maps.

Many of the earliest maps do not show Mare Island by name. Only those which do will help us with the problem of determining what was called Mare Island.

The earliest map in the record showing Mare Island by name is Exhibit 13. (R. II—657, IV—42) If the Court will look at this map it will be noted that it was prepared by Lieutenant Ord of the United States Army in 1848 and shows a clear break at the northerly end of the high land. In order to make our position clear, we do not claim that there is or was a channel or water-course cutting across the neck at the northerly end of the high land, although we do claim that, as has been shown, that area was at such a low elevation that it was frequently covered by high water. The fact that Lieutenant Ord shows an actual break at this point is strong evidence as to what, in the early days, was considered to be Mare Island.

The next map is the Ellis map of 1850, Exhibit 11. (R. II—655, IV—40) It will be noted that the island is called "Mares Island". All of the area to northwest of the high land including the area of Survey 569, is shown as water. Again, this is significant evidence as to how low and wet the tule marsh must have been. The map indicates that the popular understanding at the time was that the high land alone was what was called Mare Island.

We next come to the well known Ringgold chart, which the government offered in evidence as Exhibit K-7. (R. II—418, IV—9) The Court will note that Ringgold, who was a Commander in the United States Navy (R. II—

415); while he shows in general outline all of the swamp land to the northwest of Mare Island, confines the name "Mare I" to the high and dry land.

We come next to the large number of official charts or maps prepared by the United States Coast and Geodetic Survey, all of which were identified and testified to by Lieutenant Smith. We shall not burden the Court with a review of these maps in detail, but will merely point out that on every one of them the name Mare Island is confined to the high land. See Exhibit L-2 (R. II—430, IV—11), Exhibit L-5 (R. II—437, IV—12), Exhibit L-6 (R. II—438, IV—13), Exhibit L-9 (R. II—452, IV—15), Exhibit L-10 (R. II—461, IV—16), Exhibit L-11 (R. II—463, IV—17), Exhibit L-15 (R. II—473, IV—19). These maps, made over a period commencing with as early as 1851 down to 1915, all consistently show the high land and the high land alone designated by the name of "Mare Island". To these should be added the Coast and Geodetic Survey map prepared especially for use in the *Irwin* case and marked Exhibit U in that case, which shows exactly the same thing. (Ex. 17, R. II—658, IV—49)

At the trial we asked Lieutenant Smith the significance of this use of the place name. He testified that the surveyor in the field ascertains what names, in local usage, are used to identify the various features (R. II—496) and that the Coast Survey, in making up its charts, uses these names if they are uncontroverted and are believed to be accurate. If the matter is controversial the Coast Survey does not show the name upon its chart until the subject has been investigated and they have satisfied their own

minds as to what the correct usage is. (R. II—497-498) When asked specifically with respect to the use of the name "Mare Island", he testified in substance that the fact that that name was always shown only upon the high land indicated that *that* was the feature known by the name and had the tule marsh to the northwest of the high land also been known by that name the maps would have so indicated by showing the name in that area as well as upon the high land. (R. II—498-504) This testimony, taken in connection with the charts themselves, well nigh concludes the matter.

In addition to the Coast Survey charts we have the maps of the United States Geological Survey. Exhibit 3 is the Napa Quadrangle (R. II—647-648, IV—36), the pertinent portions of which are shown opposite page 3 of this brief. Significantly, the lands in Swamp Land Survey 569 are marked "Island No. 1", showing that the United States Geological Survey understood that they were not a part of Mare Island. The Mare Island Quadrangle, Exhibit 2, shows the same state of affairs upon a larger scale. (R. II—625, IV—35)

The authorities of the State of California having to do with the mapping of this area agreed exactly with the federal authorities. Our Exhibit 1 is the map of 1873 prepared by the State Geological Survey of California (R. II—506) and shows the name "Mare Island" as confined to the high and dry land. (R. II—508, IV—34) The official county maps prepared by the County Surveyor of Solano County also confine the name "Mare Island" to the high land. See Exhibit 14 (R. II—657, IV—44), Ex-

hibit 15 (R. II—657, IV—46) and Exhibit 16 (R. II—657-658, IV—48).

There are other maps in the record telling the same story but we shall not burden the Court with them. The evidence in this particular is without conflict.

The Sloat Board Report.

Equally as important as the maps—indeed, perhaps of even greater importance—as indicating what was known as "Mare Island" and what its true boundaries were is the report of the Sloat Board made in 1852 (Ex. F-1; R. II—395, III—13) and the accompanying Plans No. 7 and 8 (Ex. F-2, R. II—395, IV—1 and 2).

In 1852 a board of officers under the command of Commodore Sloat was appointed by the Navy Department to examine the shores and waters of the Bay of San Francisco for the purpose of selecting a site for the navy yard and depot. (R. III—13) After an extensive examination, the Board selected Mare Island as the best site. (R. III—26) The discussion of this site is quite detailed and gives the clearest idea of any record extant, so far as the researches of counsel could discover, as to what was known as Mare Island.

First of importance to note is that the Board made and returned with its report as Plan No. 7 what is described in the report itself as "Plan of Mare Island showing the Topography of the land, and soundings through Mare Island Straits". (R. III—13) This plan is shown at page 1 of Volume IV of the Record. In looking at this plan the Court will observe the significance of the statement in the

report that this is a plan "of Mare Island" and that it shows "the Topography of the land". If the 8 miles of tule marsh to the northwest had been regarded in those days as a part of Mare Island we should not find a plan of the high land alone referred to as a plan "of Mare Island", especially when the very next plan referred to in the report states that it is a "Plan of *part* of Mare Island, showing the positions of the several proposed buildings and other improvements". (R. III—13) It was evident that the Board was precise in stating whether it was referring to Mare Island or only to a part of Mare Island.

The report does not leave this conclusion merely to inference, however. Its language is specific as to what was Mare Island. It says:

> "The point which presents the most favorable appearance for the location of a great Naval establishment, is Mare Island, on the north of the entrance to Carquinez Straits, and bounded on the east by Mare Island straits, which separates it from the City of Vallejo on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma. The surface of this Island at the south end is broken and elevated, some of the hills rising to the height of 280 feet, but at the north end it is more uniform and may be easily reduced to a convenient grade. A careful survey of this Island and Straits has been made, and the soundings and elevations of the land will be seen on plan No. 7." (R. III—26)

First, the Court will note that Plan No. 7 is "a careful survey of this Island". In other words, Mare Island is

what is shown on this plan and it does not include the tule marsh now claimed by the government.

Next, the Court will note that the boundaries of the island are stated by the Board. The eastern boundary, which obviously is not a part of Mare Island, is stated to be Mare Island Straits. Similarly, the western boundary, which likewise is not a part of the island, is stated to be San Pablo Bay. Finally, the northern boundary—not the northern part of the island—is stated to be the tule land "extending several miles in the direction of the Valley of Sonoma". The very fact that the tule is referred to as a boundary of the island eliminates it as a part of the island itself.

Next, the Court will note that the "north end" of the island is said to be more uniform than the southerly end "and may be easily reduced to a convenient grade". Manifestly, the Board was not speaking of the tule marsh when it was speaking of reducing the surface of the island to a convenient grade. The description of the relatively flat area of the northerly end of the high land as the "north end" of the island was consistent with the previous description of the northerly boundary as being the tule marsh.

Further along in the report we find these important passages:

> "Mare Island contains, including the tule opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, though it is not proposed to occupy the whole of this large area for the Yard. A portion will be required for Hospital, Magazine, Barracks and Coal Depot, while the

high lands at the south end can be used for grazing Government stock and may be advantageously occupied by works of defence.

* * *

"Plan No. 8 presents the arrangements proposed; the line of wharf front is in deep water, there being generally a sufficient depth for the largest ship of the line to lie in safety; this line is in the direction of the current, and extends the whole length of the island, a distance of about two miles." (R. III—32-33)

The statement that Mare Island, including the tule opposite Vallejo, contains about 900 acres should put to an end all claim that the lands here in suit were considered a portion of the island. The very mention of the tule opposite Vallejo, without including the 8 miles of tule up toward Sonoma Creek, would eliminate the latter, as does the statement of over-all area. Even more eloquent, if that be possible, is the statement that the whole length of the island is about two miles. This obviously could refer only to the high land. Had the tule marsh to the northwest been included, the distance would have been ten miles. Furthermore, Plan No. 8 at page 2 of Volume IV of the record shows the plan for the naval establishment and shows the wharf referred to, which extends only along the high land. We ask the Court to observe particularly the northwesterly end of the wharf line because, as the report says, this wharf line extends "the whole length of the island".

It is respectfully submitted that these references by the Sloat Board do not admit a reasonable difference of opin-

ion as to what was known and thought to be Mare Island. The report is, throughout, absolutely inconsistent with any view other than that the high land, and the high land alone, was what was known and referred to as Mare Island.

The Confirmation Proceedings.

This brings us to the confirmation proceedings. They disclose, as does the other evidence, that all that was granted or confirmed was the place called Mare Island.

The entire proceedings before the Board of Land Commissioners is set forth in the first 70 pages of Volume V of the record. These include Castro's petition, the grant to him, the petition to the Board, the evidence taken, the Board's opinion and its decree. This evidence is important.

We start with Castro's petition. In order that he might have a refuge from the depredation of the Indians Castro asked for "an adjacent Island in the bay of San Francisco called 'Mare Island' which has no owner". (R. V—36) Investigation disclosing that the island was vacant and subject to grant (R. V—36-37), Governor Alvarado made the grant in 1841. (R. V—38) The translation of it recites Castro's petition "for the ownership of the Island named 'La Yegu' situate in the neighborhood of the Straits of Carquinez" and the grant to him "of the said Island in all its extent". (R. V—39) In other words, Castro asked for the island called or named Mare Island and Alvarado granted him all that he asked for.

The petition to the Board of Land Commissioners showed that Bissell and Aspinwall had purchased Castro's

claim and they petitioned "for the Place named 'Isla de Yegua' or 'Mare Island' ". (R. V—2) The petition states the provisional grant to Castro "of the Island called 'Isla de la Yegua' in the present County of Sonoma" and the final grant in fee of "the said tract of Land Mare Island". (R. V—4)

The entire record before the Board shows that the only question that was raised was as to the validity of the grant. No question as to its extent was either presented or considered. The Board's opinion discloses that the only question decided was that the grant was valid and even this conclusion was reached only with difficulty. (R. V—67-69) The only evidence before the Board as to the extent of the grant was the testimony of General Vallejo, who described the island as lying at the mouth of Napa Creek, being about two and one-half miles long and of irregular width and containing about half a league of land, a little more or less. (R. V—22-23) We have already pointed out (page 5, *supra*) that this description fits with considerable accuracy the high and dry land called Mare Island and is wholly inconsistent with the claim that the lands in Survey 569 were a part of the island. We shall not repeat that discussion here.

It therefore appears on the face of the confirmation proceedings that all that Castro asked for and all that was granted to him was the place named or called Mare Island. The only place ever called or known by that name was the high and dry land. Moreover, under the Mexican law, which was the law of the grant, only the land down to the line of highest high-water throughout the year

passed by virtue of the grant and that, again, included only the high and dry land.

It is respectfully submitted that upon the record the decree of the majority below cannot stand. Not only have the findings of the trial court, supported by the overwhelming weight of the evidence, been ignored, but a construction has been given to the confirmation decree which is plainly in conflict with the record upon which it was made and erroneously multiplies the area that was granted and confirmed more than five-fold. This was pointed out by the dissenting opinion, which the majority refused to heed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 848.

MARY W. STEWART, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONERS' REPLY BRIEF.

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April 27, 1942.

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PETITIONERS' REPLY BRIEF.

INTRODUCTORY.

This reply brief will conform essentially with the order observed in petitioners' opening brief. In the interest of brevity the discussion of principles of equity and the defense of equitable estoppel will be included in a single subdivision (III).

Petitioners' contentions upon the issue of fact have been adequately developed in our opening brief (Point V, pages 63-70 and appendix). Our reply to the opposing presentation will be found in the appendix hereto.

I.

STARE DECISIS.

The Court of Appeals Was Not Free to Disregard the Decision in the Irwin Case.

We have urged in our opening brief that inasmuch as the identical claims now made by the Government to the identical lands here in suit were adjudicated adversely to the United States in *San Francisco Savings Union* v. *Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin* v. *San Francisco Savings Union* (1890) 136 U. S. 578, and inasmuch as that decision was allowed to go unchallenged for 40 years, it became a part of the law of the title and the Court of Appeals was not free to disregard it. (Ptnrs. Br. 18-26). At page 43 of its brief the Government concedes that it is "familiar doctrine that where titles to land may be affected the courts strictly adhere to the doctrine of *stare decisis*". Obviously, this is a recognition of the essential validity of the principle upon which we rely.

We have further pointed out (Ptnrs. Br. 21), and in the very nature of the principle it necessarily follows, that the rule requires the strictest adherence to the earlier decision where the identical title to the identical lands is again under attack, based upon the precise claim previously made and adjudicated. Such cases are, as would be expected, not as common as those which invoke only the more general doctrine, but we have cited a number of them in our opening brief (pages 21-25) and the Court will note the special strictness with which the doctrine is in such cases applied. Even where the prior decision turns upon a question which is largely one of fact or of mixed law and fact—such as the construction of a particular instrument—the courts regard the determination as being the law of the particular title which, after the decision has long stood, they do not feel free to disturb. Upon principle it should be so, for otherwise there can be no stability of land titles based upon adjudication.

In petitioners' opening brief we stated that after the affirmance by this Court of the decision in the *Irwin* case in 1890, the result was accepted as final by everyone. The Government's brief disagrees with this statement (Govt. Br. 11-14), but in our view without warrant.

The brief for the Government goes outside of the record in this case and points to material in the record in the *O'Donnell* case with a view to showing that there was a considerable delay after the *Irwin* decision before the last of the lands in Survey 569 were platted and patented—the intended inference being that this serves to show that the *Irwin* decision was not accepted as final. The fact is that most of this evidence relates primarily to *Survey 34** and it was the controversy as to *those* lands that delayed the final approval of the township plats and hence the issuance of petitioners' final patent. The record here affirmatively shows that, because of the *Irwin* decision, the Navy no longer claimed the land in *Survey 569* and accordingly First Assistant Secretary of the Interior Finney ordered the land patented. (Ex 37, R. III—260, 262-263) Thereupon, without any protest, it was patented. The first attack upon the *Irwin* decision was the filing of the instant suit.

The Government's brief criticises the opinion in the *Irwin* case in several particulars with a view to showing that the case was wrongly decided. Were the criticisms valid they would afford no reason, after all these years, to depart from the decision. The precise purpose of the rule of *stare decisis* is to afford protection to those who rely on decisions of long standing against the vicissitude of later change. We are unwilling, however, to let the attack upon the *Irwin* decision go unanswered, because in all particulars essential to petitioners' case here the criticisms in the Government's brief are without merit.

The Government's brief asserts that, so far as the principle of *Wright* v. *Roseberry* as to maintaining an action of ejectment upon a swamp land title before patent has been issued by the United States is concerned, the decision has

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*All emphasis throughout this brief is ours unless expressly otherwise noted.

been repudiated. (Govt. Br. 37) If so, the matter is of no moment since the case at bar in no respect turns upon that principle. Patents have been issued here, many years since.

Even less to the point is the suggestion that Mr. Justice Field expressed doubt whether the United States, not being suable without its consent, could acquire title by adverse possession. His decision that no such possession was in fact shown is indisputably correct. And it need hardly be added that the Government has never, since 1890, been in possession of any portion of the land in litigation here, adverse or otherwise.

The Government's brief suggests that the decision of Mr. Justice Field is vulnerable in so far as it holds (28 Fed. 715) that after Congress had granted these lands in 1850 it was not competent for the President to revoke the grant by a reservation made in 1853. The Government has overlooked the fact that Judge Van Fleet's contrary conclusion in *Sawyer* v. *Osterhaus* (1914) 212 Fed. 765 was rejected by this Court in the later case of *United States* v. *Minnesota* (1926) 270 U. S. 181, 208, where it was clearly indicated that it was not competent for the Government to revoke a grant made by the Swamp Land Act.

Finally, the opposing brief seeks to avoid the effect of the *Irwin* decision upon the ground that Mr. Justice Field erroneously held the land to be below the line of ordinary high-water mark. This again impresses us as a diversion. In our brief we have shown that Mr. Justice Field could not have so held because the land would then have been tide land and would not have passed under the Swamp Land Act. (Ptnrs. Br. 29-30) It might appropriately be added that, had it been the thought of Mr. Justice Field that the land was below ordinary high-water mark, there would have been no occasion for him to discuss whether, prior to patent, the plaintiffs could prove the swamp land character of the land —which was the main question in the case. Nor would there have been occasion for this Court to affirm the decision on that very point under the authority of *Wright* v. *Roseberry*. The circumstance that this was the principal point discussed in the opinion shows that Mr. Justice Field could not

have intended to decide that the lands were tide lands and hence completely outside the Swamp Land Grant. The express holding that they were within the Act excludes the Government's contention that he held them to be below the line of ordinary high-water.

The Government's brief asserts (page 44) that *Hussey* v. *United States* (1911) 222 U. S. 88 involved "a contention similar to that urged by petitioners". The Government appears to have misconstrued the case, for it does not involve the principle of *stare decisis* at all. There the plaintiff purchased *before* the prior adjudication—not after and in reliance upon it. All that the Court held was that in such circumstances the prior decision was not a rule of property and was not *res judicata* against the United States.

The Government's brief fails to cite any case wherein, a prior adjudication of the identical title having been allowed to stand for many years so that those dealing with the title must necessarily have relied thereon, the courts have later felt free to depart from the earlier adjudication. The cases which we have cited (Ptnrs. Br. 21-25) convincingly show that in such circumstances the courts will not disturb the earlier determination.

II.

THE STATUTE OF LIMITATIONS.

In our opening brief (pages 32-40) it was shown that as to Swamp Land Patents 52 and 172 issued, respectively, 34 and 20 years before this suit was brought, the action is barred by the federal six-year statute of limitations which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U.S.C., Title 43, § 1166)

Although the patents involved are ordinary swamp land patents the Government claims that an exception should be read into the statute so as to exclude these patents from its operation. It is not represented that this case is not within

the mischief aimed at by the statute. The gross inequity of the result reached by the majority of the Court of Appeals makes plain the need of statutory protection against belated attacks.

The Government's contention comes to this: that the lands in suit, being (so it is claimed) within the Castro grant, were not subject to the jurisdiction of the Land Department, that the patents are nullities, and that the statute affords petitioners no protection. We have replied (Ptners. Br. 37-38) that such was the situation in *United States* v. *Chandler-Dunbar Water Power Company* (1908) 209 U. S. 447. The Court, speaking through Mr. Justice Holmes, assumed that the land, being within a military reservation, was not subject to the jurisdiction of the Land Department but went on to say:

> "It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared to be void. When it refers to 'any patent heretofore issued', it describes the purport and source of the document, not its legal effect. If the Act were confined to valid patents it would be almost or quite without use.
>
> * * * * *
>
> "This statute must be taken to mean that the patent is to be held good; and is to have the same effect against the United States that it would have had if it had been valid in the first place." (209 U. S. 450)

The essential parallel between the situation in the *Chandler-Dunbar* case and the situation in the instant case would seem to be very clear. In the former case the Government contended that the land was within a military reservation, had therefore been withdrawn from the jurisdiction of the Land Department, and accordingly the issue of the patent was unauthorized. Here the argument is that, although the lands were swamp lands, title had previously vested in the Government thus withdrawing the lands from the jurisdiction of the Land Department and accordingly the issue of these patents was unauthorized. We discover no difference going to the applicability of the statute of limitations.

Returning to the holding in the *Chandler-Dunbar* case, it was ruled that, whether the President as head of the Land Department had authority to make the patent,

> "the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect."

The Government's position is not aided by referring to the language of the Court's opinion that "whether reserved or not" the land was "*in kind* open to sale and conveyance through the Land Department." Here also, except for the alleged fact depriving the Land Department of jurisdiction —*i.e.*, the claimed fact that the land was within the confirmation decree—the lands were "in kind open to . . . conveyance through the Land Department" and the Government concedes as much. (Govt. Br. 46)

The law is, we think, plain. Mr. Justice Holmes has made it clear that the statute is a bar provided, and provided only, that the interest of the United States alone is concerned. It is not without significance that the Government has cited no case where, the interest of the United States alone being involved, the statute was held not to apply.

There is no foundation for the final assertion in the brief of the Government on this point that our contention results in "the unthinkable consequence that, after six years, the Government would be powerless to attack any patent, however obtained and regardless of the site covered" (Govt. Br. 51). If a patent is issued through fraud or its equivalent, the Government has six years after the fraud is discovered within which to proceed. Surely this is ample protection, especially in view of the fact that if the United States is in possession of the land patented then, as the Government claims (Govt. Br. 38), the United States may also rely on adverse possession.

If the statute is to be held not to apply in a case such as the present, then, indeed, in the phrase of Mr. Justice

Holmes previously quoted, it is "almost or quite without use."

III.

EQUITABLE ESTOPPEL.

The Government's brief admits that the United States is subject, as a suitor, to "the general principles of equity" but denies that the rule means that "the legal rights of the United States are to be determined upon general notions of fairness without regard to precedent or established principles." (Govt. Br. 52)

Petitioners' defense of equitable estoppel is based upon the following circumstances, which are indisputably established upon this record:

1. These petitioners and their predecessors had been in undisturbed and undisputed possession of these lands for a great many years continuously. Their title was not questioned by the Government from 1890 when the decision in *Irwin* v. *San Francisco Savings Union* was affirmed by this Court (136 U. S. 578) until 1930 when this suit was brought, a period of 40 years.

2. There has been neither Government possession nor attempted possession of these lands since 1890.

3. All of these petitioners purchased their lands after patents had been issued by the Government. (Parenthetically, the Government brief is in error in reciting that the Sears Point Toll Road Co. constructed its toll road "*after* (*sic*) Congress granted a right-of-way across the lands in suit." (Govt. Br. 11) The fact is that the toll road was built ten years *prior to* the Congressional grant of 1936, as the Government's brief shows on the same page, and likewise prior to the institution of this suit in 1930.)

4. The three Government patents were issued 34 years, 20 years and nearly 6 years, respectively before the bringing of this suit. All were issued voluntarily, and the most recent patent was not issued until after the Secretary of the Interior had given notice to the Secretary of the Navy, who made no protest.

5. The State patent covering these lands was issued in 1874.

6. The expenditure made by these petitioners in the purchase and improvement of their lands have exceeded $300,000.

7. At no time during the period of 40 years extending from 1890 to 1930 has the Government, by act or word, claimed title in itself or challenged the finality of the *Irwin* decision.

8. In 1896 the Navy Yard Commandant assented to a survey for the purpose of fixing the boundary between these lands and the Government lands and such a survey was made.

9. In 1913 the Navy Department filed for record in the Recorder's Office for Solano County, California, a formal "Map Showing Location of U. S. Naval Reservation, Mare Island, Vallejo, Cal." The filing was in accordance with an Act of the California Legislature of 1897 ceding to the United States exclusive jurisdiction of lands occupied by the United States for military purposes or defense. This map (Ex. 9, R. IV-38) shows that the reservation did not cover any of the lands here in suit but stopped at the present Navy Yard boundary fence.

10. In 1914 the Navy Yard authorities constructed a fence along the southerly boundary of these lands, and that boundary fence has ever since continuously been maintained by the Government.

These are the main circumstances upon which petitioners have rested their defense of equitable estoppel, and we repeat that the facts outlined above have been indisputably established upon this record.

We would not have the Court confused by suggestions in the Government's brief that there has not been acquiescence by the Government in the *Irwin* decision. The Government brief refers to certain circumstances suggesting that the United States had not abandoned its claims to these lands, but it will be found upon examination that these references are primarily to the lands in Survey No. 34 involved in the *O'Donnell* case and that the record citations are to the rec-

ord in the *O'Donnell* case which is not before this Court. (Govt. Br. 12-13) The Government brief does not attempt to explain or excuse the failure of the Government, by word or act, from 1890 to 1930, to assert any claim to these lands or to challenge the title or possession of these petitioners. Beyond doubt there was acquiescence in the *Irwin* decision *as to these lands* from 1890 to 1930, and it avails the Government nothing to show that it was claiming the O'Donnell lands which lie *within* the Navy Yard boundary fence and which had been in the uninterrupted possession and use of the Government.

We pass to certain specific contentions advanced in the Government's brief.

First, it is suggested that petitioners' argument amounts to no more than a claim to a prescriptive title and it is argued that "mere occupancy of the public lands and improvements thereon gives no vested right therein as against the United States." (Citing cases) (Govt. Br. 53) We make no such contention and the cited cases are not in point. These petitioners are not "mere occupants" of Government lands. They hold title under solemn patents from the United States and they rely upon an adjudication of title which had stood unchallenged for 40 years.

Second, it is argued that a court of equity should not enforce "a colorable title, like that asserted by petitioners, because of a reluctance to oust intruders upon Government property." (Govt. Br. 54) Cases are cited suggesting that "In this way, the public domain would soon be appropriated by adventurers." (Govt. Br. 54, 65) But these petitioners have no merely "colorable title," they are not "intruders upon Government property" nor are they "adventurers" upon the public domain. The words in the Government brief have been ineptly chosen. They do not properly characterize the acts of these petitioners in relying upon Government patents and upon Government acquiescence in a decision as to title which had stood unassailed.

Third, it is represented, quoting from the majority opinion of the Circuit Court of Appeals, that the rights of those claiming under the State have been from the beginning "shrouded in doubt and uncertainty." (Govt. Br. 57) With deference, this characterization is quite unwarranted. The words could be applied to the O'Donnell lands which were continuously in the possession and use of the Government and as to which there has been no adjudication. They are not applicable to petitioners' lands which the Government had not claimed or possessed for more than a generation and title to which was adjudicated. Petitioners rightfully relied upon these long years of Government non-action.

Fourth, it is said that "Congress has never relinquished the Government's claim of title to the lands in suit" and that "The defense of equitable estoppel is therefore reduced to the charge that the United States is bound by the action or non-action of its officers." (Govt. Br. 59). The same arguments could with equal propriety be advanced on the part of the Government in the case of the *United States* v. *Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447. If contentions of this variety were to prevail, the defense of equitable estoppel could never be invoked successfully against the Government.[1]

The cases cited in this part of the Government's brief are not antagonistic to the authorities upon which we rely. For example, in *Utah Power & Light Co.* v. *United States* (1917) 243 U. S. 389, cited upon page 59 and elsewhere of the Government's brief, the Government was not seeking unquali-

[1]The Government brief relies upon Pomeroy's *Equity Jurisprudence* as authority for a supposed rule that before there can be an estoppel affecting title to land the legal owner must be guilty of "'intentional deceit' or at least of "that gross negligence which is evidence of an intent to deceive" (Govt. Br. 61-62). But the rule is not so narrow. Pomeroy has said under the caption "Acquiescence as an Estoppel to Rights of Property or of Contract," that "A fraudulent intention to deceive or mislead is not essential" (2 *Pomeroy's Equity Jurisprudence*, Fifth Edition; § 818).

fiedly to oust the power company. This appears clearly from the following statement taken from the opinion of this Court in that case:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress or, at their option, to remove from the government lands." (243 U. S. page 403)

All that the Government really sought was compliance with Government laws, rules and regulations respecting the enjoyment of rights on lands within the national forests. (See also the opinion of the Circuit Court of Appeals in the same case below, 230 Fed. 328, 339-340). The Government was not seeking a forfeiture.

The case of *Causey* v. *United States* (1916) 240 U. S. 399, reviewed upon pages 55 and 56 of the Government's brief, involved a suit by the United States to cancel a patent issued through improper use of Government scrip. There the patentee and his assignee were wrong-doers, having obtained the patents through fraud. Being wrong-doers they were required to restore the title unlawfully obtained and could not claim equitable relief. These petitioners on the other hand are not wrong-doers.

The case of *Lee Wilson & Co.* v. *United States* (1917) 245 U. S. 24, upon which the Government also relies (Govt. Br. 59) was again a case of fraud, or of error so gross as to amount to fraud, and the Government acted upon the discovery of the fraud. The case simply holds that when fraud has been shown on the part of one who has secured title to Government lands the Government may not be estopped by acts of its administrative officers "before the discovery of the fraud."

The case of *Jeems Bayou etc. Club* v. *United States* (1923) 260 U. S. 561, was likewise a case of fraud or, in the language of the opinion of this Court in that case, there

was "such gross and palpable error as to constitute in effect fraud upon the Government" (260 U. S. 563-564).

The case of *Cramer* v. *United States* (1923) 261 U. S. 219, arose upon a suit brought by the Government on behalf of certain Indian wards to cancel a patent issued under the Railroad Act of 1866 upon the ground that certain of the lands embraced within the patent were at the time of the act and ever since had been occupied by these Indians and therefore were excepted from the railroad grant. The essence of the holding of the Court is disclosed by the following excerpt from the opinion (p. 234):

> "Since these Indians, with the implied consent of the government, had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the government was under the circumstances, unauthorized, and could not bind the government; much less could it deprive the Indians of their rights." (Citing cases)

The case is not in point here.

As we appraise the cases upon which the Government relies, none of them can afford authority or warrant for the effort of the Government to dispossess these petitioners and forfeit their titles when they are innocent of any wrong-doing or of any charge of wrong-doing or bad faith. They have relied upon United States Government patents and upon a long standing adjudication of title.

Petitioners' case would seem to be both within the terms and responsive to the purpose of the rule of equitable estoppel which we invoke against this suit.

IV.

The Findings of the Trial Court That the Lands in Suit Are Not a Part of Mare Island and Were Not Within the Castro Grant or the Confirmation Decree Were Amply Supported by the Evidence and Should Have Been Accepted by the Court of Appeals.

In petitioners' opening brief it was shown, in discussing this issue, that the inequitable result of the judgment of the majority below could have been avoided by construing the confirmation decree as it is written—as embracing only the lands called Mare Island, which did not include any of the land in suit. The trial court found that none of this land was ever known as or called Mare Island, that none of it was embraced within the Castro grant nor within the confirmation decree, and that accordingly it passed to the State under the Swamp Land Act. These findings are supported by the overwhelming weight of the evidence. The majority in the court below have disregarded these findings and have failed to give them any effect though manifestly they are of controlling importance, as the dissenting opinion of Judge Mathews makes plain.

Upon this essential point the opposing argument (Govt. Br. 28-35) fails to meet us. No reason is shown why the call of the confirmation decree for "the place called 'Isla de la Yegua' or Mare Island" could not and should not have been given effect.

The evidence supporting the trial court's findings was reviewed in detail in the appendix to petitioners' opening brief. This review, though to some extent discussed in the opposing brief, has not been answered. So far as that discussion calls for a reply it will be found in the appendix hereto.

In the opening brief (page 63) attention was directed to the failure of the majority of the court below to accept the findings of the trial court, in derogation, as it seemed to us, from the requirements of Rule 52 (a) of the *Rules of Civil Procedure*. The brief of the Government does not in terms seek to justify this failure to observe the rule.

CONCLUSION.

The argument for the Government is brought to a close with the suggestion that "There may be circumstances indicating that petitioners, to the extent they are not insured, should be reimbursed by the Government for expenditures in improving the lands or for other costs * * *" (Govt. Br. 66). Thus, the essential injustice—*the inequity*—of this suit on the part of the United States appears at length to find implicit recognition in the Government's brief. While this concession aids the case for the petitioners, we can see neither reason nor justice in the suggestion that a distinction may be drawn between the petitioners and their insurers. The assured and their insurers alike have relied upon the circumstances which have given rise to an equitable estoppel.

This tardy recognition of the inequity in the Government's suit is marred by the suggestion that if the petitioners are to be "reimbursed by the Government" such relief must be obtained from the legislative department. (Govt. Br. 66) It is our view that the protection which petitioners seek against inequity may be found within "the sphere of judicial authority" and in this immediate cause.

Respectfully submitted,

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APPENDIX.

The Grant to Castro Did Not Include the Lands in Suit Nor Were They Embraced Within the Confirmation Decree.

In petitioners' opening brief (pages 63-70) it was shown that the lands here in suit were not a part of Mare Island; were not, under the Mexican law, granted to Castro; and were not covered by the decree of the Board of Land Commissioners confirming the Castro grant. In the appendix to our brief the evidence as to the boundaries of Mare Island according to Mexican law was reviewed, showing that the island consisted of only the high land. The evidence as to what was called or known as Mare Island showed that nothing but the high land, and the high land alone, has never been known or called by that name.

It is significant that the Government's argument upon this point is entitled "The grant of Mare Island *to the United States* included the lands in suit." The description in the Bissell and Aspinwall deed to the Government is, as Mr. Justice Field said in the *Irwin* case, "more extensive than the one covered in the grant to Castro or by the Commissioners in the decree confirming the claim under it" (28 Fed. 714) and, as Mr. Justice Field went on to hold, Bissell and Aspinwall could not convey more than they acquired under the grant. We are concerned, therefore, with what was granted *to Castro*.

As to what, according to the Mexican law, passed by a grant of an island, the only answer to Professor Radin's clear testimony that only the land lying above highest high-water mark would pass is a bald statement that there is nothing in the Mexican law inconsistent with a grant of all of the land down to high-water mark. The case of *Jover* v. *Insular Government* (1911) 221 U. S. 623 is a case involving the powers of the Governor of the Philippines, where the land below highest high-water mark was granted for the specific purpose of reclamation and improvement, and is no authority that a grant by the Mexican Government under

the colonization law, such as we have here, would, without any specific mention, carry title to the land below the line of highest high-water. Such cases as the *Coronado Beach* case, *Teschemacher* v. *Thompson* and *Ward* v. *Mulford* merely held, as the Government has elsewhere claimed, that where land below highest high-water has been confirmed and patented it is too late to claim, collaterally, that the patent covers too much. No one of these cases goes so far as to hold that, under the Mexican law, a private grant on tide water goes to the line of ordinary high-water mark.

Nor does it advance the Government's case to argue (Govt. Br. 69) that under the civil law an island is a body of land entirely surrounded by water. The question yet remains—at what tide? The Mexican law answers this, as Dr. Radin testified, at the line of highest high tide throughout the year.

On the question of fact as to whether the lands in the "neck" were below the line of highest high-water, the Government wholly fails to meet us. In answer to petitioners' showing of the testimony of the eye witnesses that the "neck" was frequently overflowed in the late 1890's and early 1900's (Apdx. iv), before the artificial reclamation work was done, and the testimony of the Government's own witnesses as to the elevation of the tule swamp (Apdx. v-vii), the Government remarks that this was in 1900 and not in 1852. (Govt. Br. 70) The Government ignores the fact that its own witnesses testified that the natural process at the "neck" has been one of accretion or filling and not one of cutting (R. II—523, 590-592), so that conditions in 1890 were more, and not less, favorable to the Government than they were in 1852.

The Government again adverts to the sand ridge. We stated in our brief that none of the testimony showed any sand ridge in the narrows of the neck. (Apdx. xiii) The Government says in reply that it is plain from Lieutenant Smith's whole testimony that the ridge extended through Survey 34. (Govt. Br. 70-71) We repeat what we said in petitioners' opening brief,—that it is not without signifi-

cance that upon such a crucial point the Government has no specific testimony that there was a sand ridge at the narrows of the neck, that the eye witnesses testified that it was all tule marsh (Apdx. xiv) and that the Government's own map by Rousseau (Ex. S-1, R. IV—26) shows no sand ridge at this point.

In petitioners' opening brief we challenged the accuracy of the Government's Exhibit T (R. IV— 28), particularly at the critical Station 48. The Government answers by ignoring Station 48 and discussing stations at other points. (Govt. Br. 72) The Government brief does not deny that Captain Carlson testified as to how the line of 1852 is derived just as we said he did (Apdx. xv) nor that, as indicated by petitioners, the legend on the exhibit itself confirms that (Apdx. xv) nor, as petitioners pointed out, that the line of 1852 at Station 48 was not drawn as Captain Carlson and the exhibit itself said it should have been drawn. Nor does the Government undertake to state that the line of 1852 was correctly drawn as Station 48. Our argument is not answered—it is simply ignored.

The eye witnesses, as we have said, testified that the neck was frequently overflowed. (Apdx. iv) Far from showing that this was not so, the Government goes outside the record and quotes from the Joy report in the *O'Donnell* case (Govt. Br. 72) language which demonstrates that our own witnesses were correct:

> "The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tide and probably *at ordinarily high tides with a stiff wind from the southwest*, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay."

Upon the record it is plain that the land was frequently under water and, therefore, under the Mexican law all that

passed to Castro was the high land down to the line of highest high-water, which excluded all of the land in suit.

The concept of Mare Island according to the Mexican law conforms exactly with the popular understanding of what was called Mare Island. And it was the island named "La Yegua" that was granted to Castro. We have pointed out in some detail (the maps, the Sloat Board Report and the confirmation proceedings—Apdx. xvii-xxviii) the evidence showing that nothing but the high land was ever known or called by that name. The Government nevertheless challenges the trial court's finding. (Govt. Br. 32-35)

It is significant that the Government refers to no map supporting its claim. It is suggested, however, that because the Bissell and Aspinwall deed purported to cover more than the high land and because the Government from time to time claimed the swamp land in Survey 569 as being a part of Mare Island, this shows that the land was known as or called Mare Island. (Govt. Br. 33) This is not a reply. Petitioners' discussion of the Sloat Board Report (Apdx. xxii-xxvi) should be compared with that in the Government's brief. (Govt. Br. 34-35)

What was granted to Castro was the island named "La Yegua." The decree of confirmation expressly states that "the place of which confirmation is given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island. . . ." (R. V-70) Accordingly, upon the record there was no warrant for the action of the majority of the Court of Appeals in overruling the finding of the trial court that the lands in suit were not a part of Mare Island, were not granted to Castro, and were not covered by the confirmation decree.

No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1941

MARY W. STEWART ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. Vol. I, pp. 165–176) is reported in 29 F. Supp. 59. The opinion of the Circuit Court of Appeals (R. Vol. V, pp. 148–169) is reported in 121 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. Vol. V, pp. 169–170). A petition for rehearing was denied October 16, 1941 (R. Vol. V, p. 170). The petition for a writ

of certiorari was filed January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Mexican grant of Mare Island, "in all its extent," which was confirmed in 1855 by the Board of Land Commissioners as an island "bounded by the water's edge," included all lands above the line of ordinary high tide.

2. Whether a prior suit to which the United States was not a party and in which it was held that petitioners' predecessors in interest were entitled to possession of the lands in suit, established a rule of property which forecloses the United States from now asserting its title.

3. Whether the Act of March 3, 1891, which provides that suits to vacate and annul patents to land must be brought within six years after their issuance, in a suit brought after the six-year period bars the cancellation of patents for lands the disposal of which was not authorized by Congress.

4. Whether the United States is estopped from suing to quiet title to its lands because the petitioners have improved and long been in possession of the lands under patents issued by the United States, where Congress never authorized issuance of the patents or relinquishment of the rights of the United States and the petitioners at all times

had means of knowing of the infirmities in their claim of title.

STATEMENT

This is a companion suit to *United States* v. *O'Donnell, et al.*, 303 U. S. 501, and was brought to quiet the Government's title to an area of tule marsh lands lying contiguously northwest of the "O'Donnell" lands on Mare Island in San Pablo Bay, California.

In the *O'Donnell* case, this Court held that the validity of the Castro grant—under which the United States asserts ownership to the whole Island[1]—is no longer open to question, and upheld the title of the United States to the marsh lands there involved. 303 U. S. at pages 508, 514. In the present case, petitioners, like the defendants in the *O'Donnell* case, claim as patentees from California under the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519. While they do not now challenge the validity of the Castro grant, petitioners renew the contention made and over-

[1] Although the Government's ownership of the lands in both cases is claimed under a common title, separate suits were filed because the adverse claimants in each case claimed under separate swamp land surveys by the State of California and also because petitioners in the present case asserted certain "affirmative defenses" (R. Vol. I, pp. 37, 70–82, 83–93, 94–95, 131–153) which were not advanced by the claimants in the *O'Donnell* cases. Petitioners' statement (Pet. 8) that "the issues decided in the *O'Donnell* case are entirely different from those presented here," therefore, can have reference only to their affirmative defenses based on the statute of limitations and equitable estoppel.

ruled in the *O'Donnell* case[2] that none of the tule marsh lands was included within the grant, because the marsh lands were not within the area commonly known by the name "Mare Island" when the grant was made or in 1855 when it was confirmed by the Board of Land Commissioners. Petitioners also contend that even though the lands were within the confirmed grant, the United States is barred from asserting its title because of its acquiescence in petitioners' claim of ownership, its laches in bringing suit, and the issuance of patents covering some of the lands involved more than 6 years earlier than the date when the instant suit was brought, which is the statutory period of limitations for suits by the United States to annul patents.

The facts essential to the understanding of the case may be summarized as follows:

Title acquired by the United States.—As shown on the sketch contained in the opinion below (R. Vol V, p. 149) and reproduced as a frontispiece to this brief, Mare Island consists of an area of uplands at its southern extremity, to the north of which is a narrow neck or isthmus of reclaimed swamp lands that joins with a larger area of lowlands on the north extending out fanwise toward the mainland. The lands comprising the narrow isthmus were involved in the *O'Donnell*

[2] See Brief for Respondent, pp. 22–23, 31–45, and Reply Brief for United States, pp. 18–40, No. 487, October Term, 1937.

case; the lowlands to the north are the lands in suit.

The grant by Alvarado, Governor General of California, to Castro in 1841 was for the island of "La Yegua" (Mare Island) "in all its extent" (R. Vol. I, pp. 21, 165, 260). By mesne conveyances, Bissell and Aspinwall succeeded to Castro's title and presented it for confirmation to the Board of Land Commissioners established by the Act of March 3, 1851, c. 41, 9 Stat. 631 (R. Vol. I, p. 260). The Board confirmed the Castro grant in a decree dated May 8, 1855, which provides (R. Vol. V, p. 70):

> The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de La Yegua" or Mare Island and being an Island is bounded by the water's edge.

While the confirmation proceeding was pending, the United States, on January 4, 1853, purchased from Bissell and Aspinwall "all that tract of land and Island called and known as Mare Island * * * including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same" for a consideration of $83,491.00 (R. Vol. III, pp. 70–74). A month later, President Fillmore, by Executive order, reserved the Island "together with all its appendages of Tule or Marsh land" for use as a Navy Yard and Naval Depot (R. Vol. III, pp. 58–60).

Appellees' claim under the Swamp Lands Act.— By the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519, the United States granted to California the swamp and overflowed lands within her borders which were not privately owned; and nineteen years later, on June 25, 1869, at the request of one Hinckley, a survey was made of the lands in suit by the county surveyor of Solano County (R. Vol. IV, p. 37). On April 7, 1874, California issued its patent to Hinckley's assignee, from whom stems the petitioner's claim of title (R. Vol. III, pp. 185–187).

Nine years later, in 1883, petitioners' predecessors in interest brought an action in ejectment against the Commandant of the Navy Yard to obtain possession of the lands. The Commandant, who was represented by the United States Attorney and a Special Assistant appointed at his request by the Attorney General (R. Vol. III, p. 203), defended on the ground that the state patent conveyed no title because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed lands, and on the further ground, *inter alia,* that title was in the United States under the Castro grant. Mr. Justice Field, sitting on circuit, and Judge Sawyer held, however, that since the Swamp Lands Act was a grant *in praesenti,* the absence of a segregation could not defeat plaintiffs' title and they were entitled to show the character of the land by parol evidence.

That evidence showed that the lands were below the line of ordinary high tide,[2] and the lands, therefore, were held not to have been included within the Castro grant, because that grant was "only to the island, 'bounded by the water's edge' " and could not extend beyond ordinary high tide. Judgment was accordingly entered against the Commandant. *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.). The judgment was affirmed by this Court on the authority of *Wright* v. *Roseberry*, 121 U. S. 488, which dealt with the question of the effect of the absence of a segregation by the Secretary of the Interior. 136 U. S. 578.

By the affirmance of the judgment, officers of the Navy Department felt that the title of the United States "was lost" (R. Vol. III, pp. 262, 264), and when Dr. L. E. Cross went into possession of the lands six years later and asked the Commandant for permission to employ a Navy Yard surveyor to locate the southern boundary of his claim, the Commandant agreed with the hope "that the boundary line once established may be done so accurately that no objection will ever be raised by either of the parties interested therein" (R. Vol. III, pp. 690–692). That same year, 1896, and again in 1910 and 1924, patents were issued by the United States to California covering, in the

[2] The petitioners in the instant case have admitted and do not now deny that the lands here involved were above ordinary high tide (see pp. 9–10, 12, *infra*).

aggregate, all of the lands in suit (R. Vol. III, pp. 189, 192, 196.)

Petitioners' predecessors thereupon commenced construction of levees to reclaim the lands "for general agricultural purposes, stock raising" (R. Vol. II, p. 529). In recent years the northwest portion has been used "mostly for gun clubs," or "duck clubs" (R. Vol. II, pp. 631–632, 637). Dr. Cross' son lived on the lands with his family and workmen from 1898 to 1907 (R. Vol. II, pp. 526, 532, 689), and a farmer named Harold Casebolt testified that he has lived there for seven years (R. Vol. II, pp. 635–637). The record does not disclose that anyone else has lived on this land. The Pacific Gas & Electric Company has erected power lines "across the northern section of the gun club" (R. Vol. II, pp. 632–633, 636) under a right-of-way and easement obtained from Dr. Cross in 1911 (R. Vol. I, p. 160).

Proceedings below.—The United States brought this suit to quiet title on April 22, 1930, but trial was postponed to await a final decision in the *O'Donnell* case. At the trial, the only issue, apart from petitioner's affirmative defenses, was the same as that raised in the *O'Donnell* case, namely, whether there was only one island, as the Government contended, or two islands, as petitioners claimed. The trial judge, who also had presided at the trial in the *O'Donnell* case, held for the petitioners, thus reaching a result directly contrary to his conclusion upon

substantially identical evidence in the *O'Donnell* case (R. Vol. I, pp. 257–258, 279); without undertaking to state definitely where he thought Mare Island began or ended, he held that none of the lands in suit ever was a part of Mare Island (R. Vol. I, p. 261). His opinion shows that, notwithstanding petitioners' concession that they could not acquire title by adverse possession as against the United States, he based the decree chiefly upon the ground that even if the lands were included in the Castro grant, petitioner's "open, exclusive, continuous possession * * * preclude the Government from ever establishing its claim to ownership" (R. Vol. I, pp. 175–176).

The trial court also held (R. Vol. I, p. 176), as to the lands for which patents were issued in 1896 and 1910, that the present suit is barred by the Act of March 3, 1891, Sec. 8, c. 561; 26 Stat. 1095, 1099, which requires suit to be brought within six years after the issuance of a patent. The court stated (R. Vol. I, p. 169) that it was unnecessary to discuss the merits of the affirmative defenses that a public boundary divides Mare Island from the lands claimed by petitioners,[1] and that the United States is estopped from asserting its title.

The Circuit Court of Appeals reversed (R. Vol. V, pp. 169–170). The majority held that the con-

[1] Petitioners have abandoned this defense in this Court. The court below held that it was "too far-fetched to warrant extended comment" (R. Vol. V, p. 163).

firmatory decree of May 8, 1855, conclusively established the Government's title to all land above mean high water, and that since it was undisputed that the marshlands were all above that line (R. Vol. V, pp. 155, 167), title to the entire area was vested in the United States (R. Vol. V, pp. 157–158). The court also held that the Act of March 3, 1891, did not bar cancellation of the patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162), and that under the rule that the United States could not be prejudiced by unauthorized action of its officials or laches, the suit was not barred in equity (R. Vol. V, pp. 163–166).

Judge Denman, concurring, stated that he did so "despite the grossly inequitable result arising from the Government's reliance on its freedom from the defense of laches," and expressed the view that this "is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court" (R. Vol. V, p. 166). Judge Mathews, who dissented, did so upon the ground that the trial court found, in effect, that the lands in suit were not a part of Mare Island at the tim of the grant to Castro or at the time of the confirmation decree in 1855 and that this finding was supported by evidence (R. Vol. V, pp. 167–168).[5]

[5] The court below held that the land east of Boat Cut-off or Dutchman's Slough (see frontispiece map) was not a part of the Castro grant, since Boat Cut-off was found to be a navigable waterway. It affirmed the judgment of the district court with respect to this land (R. Vol. V, pp. 158–161). The Government has not appealed from this holding.

ARGUMENT

The decision of the Circuit Court of Appeals is correct and presents no conflict or other reason calling for a review.

1. Petitioners contend that the court below erred in holding that the lands in suit were a part of Mare Island and were embraced within the Castro grant which was confirmed in 1855 (Pet. 10, 12, Br. 35–41). However, the decree of confirmation, *supra*, p. 5, specifically described the area confirmed as "bounded by the water's edge." Such a description, as the court below pointed out (R. Vol. V, p. 156), has invariably been held to refer to the line of ordinary high tide.* *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22–25; *Shively* v. *Bowlby*, 152 U. S. 1, 29; *United States* v. *Pacheco*, 2 Wall. 587; *Teschemacher* v. *Thompson*, 18 Cal. 11 (1861); *Ward*

* The court below rejected the contention advanced by petitioners in that court to the effect that the boundary "water's edge" given in the decree must be determined under the civil law then prevailing in Mexico as being "the line reached by the highest tide during the year" (R. Vol. V, pp. 155–156). Following the uniform decisions of this Court and the courts of California, the court held that the confirmatory decree must be accepted as a common law instrument. See cases cited in text *supra*. The Government proved, moreover, that the elevation of the land in 1852 was from 1.4 to 2.5 feet above even the highest high tide (Ex. T, R. Vol. IV, p. 28; Vol. II, pp. 577–583, 586–597). The trial court made no finding as to the elevation of the lands above ordinary high tide and the Circuit Court of Appeals declined to "consider the factual argument beyond saying that the record leaves the matter substantially doubt" (R. Vol. V, p. 156).

v. *Mulford*, 32 Cal. 365 (1867); *More* v. *Massini*, 37 Cal. 432 (1869). The decree of confirmation thus stands as a conclusive determination that the Castro grant extended to all lands lying above that line. *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487–488; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 184; *United States* v. *Hancock*, 133 U. S. 193, 196; *Higueras* v. *United States*, 5 Wall. 827, 830, 838. Since in the court below petitioners conceded and do not now deny that the evidence shows that the entire tule marsh area was above the line of mean high tide (R. Vol. V, p. 167), there is no basis whatever for their contention that the lands here involved were not included within the grant.

2. Nor is there merit to petitioners' contention (Pet. 9, 10–11; Br. 2–3, 5–14) that the legal title of the United States has been lost by the operation of "a rule of property" resulting from the decision in *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed, 136 U. S. 578. Petitioners concede that the judgment in that case "is not *res judicata* as to the United States" (Br. 5, footnote). Moreover, as already stated, they have conceded that the evidence in the instant case shows that the lands were above the line of mean high tide, whereas the decision in the Irwin case was based on an opposite finding.[7]

[7] It is also to be noted (1) insofar as the *Irwin* case held that the plaintiffs could show the swamp land character of the land by oral testimony, it has "been repeatedly re-

If any prior adjudication is pertinent to the issue herein, it is the decision in the *O'Donnell* case. Upon evidence substantially the same as that introduced in the present case, this Court sustained the concurrent findings of the courts below that the tule marshlands there in question were not overflowed and hence were within the Castro grant. Since petitioners' contention that the lands here involved were not a part of Mare Island must fail if the lands in the *O'Donnell* case were not under water so as to form two islands, it amounts, in effect, to a collateral attack upon the decree in that case. And it is not supported by any new evidence or valid argument. Cf. *Kolb* v. *Swann*, 68 Md. 516, 13 Atl. 379 (1888); *Fernald* v. *First Church of Christ, Scientist*, 77 N. H. 108, 88 Atl. 705 (1913); *Sequatchie & S. P. C. & I. Co.* v. *Tennessee C., I. & R. Co.*, 131 Tenn. 221, 174 S. W. 1122 (1915); *United States* v. *Neleigh*, 1 Black 298, 305; *United States* v. *Grimes*, 2 Black 610, 612.

3. Likewise without merit is petitioners' contention (Pet. 9, 11; Br. 3, 14–18) that the Act of

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pudiated by the Supreme Court and can no longer be regarded as obtaining." *Sawyer* v. *Osterhaus*, 212 Fed. 765, 774, citing *Rogers' Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; (2) insofar as it held that the United States could not acquire a valid title by adverse possession it was overruled in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, in which Mr. Justice Field dissented; (3) insofar as it held that President Fillmore's reservation of the land for a navy yard was ineffective, it is contrary to the subsequent decision of Judge Van Fleet in *Sawyer* v. *Osterhaus*, *supra*.

March 31, 1891, Section 8, c. 561, 26 Stat. 1095, 1099, providing that suits by the United States to annul and cancel any patent must be brought within six years of its issuance, precluded cancellation of the swamp patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162). That statute is "strictly a part of the public land laws" (*United States* v. *Minnesota*, 270 U. S. 181, 196) and is confined in scope to "public land of the United States," that is, to those lands "open to sale and conveyance through the land department." *United States* v. *Winona &c. Railroad*, 165 U. S. 463, 476; *United States* v. *Whited & Wheless*, 246 U. S. 552; *Newhall* v. *Sanger*, 92 U. S. 761; *La Roque* v. *United States*, 239 U. S. 62, 68; *Cramer* v. *United States*, 261 U. S. 219. The lands in suit were not of that character.

The Swamp Lands Act was a grant *in praesenti* and the lands in suit were held in private ownership when it was enacted. Accordingly, the Act did not pass them to California; it was effective to transfer the lands described in it "only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress." *United States* v. *O'Donnell*, 303 U. S. 501, at 509. And since no other statute authorized the Land Department to dispose of the lands, petitioners' patents are "inoperative and void" (*Smelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Conway*, 175 U. S. 60, 68) and the issuance of them determined "no legal or

equitable right of the United States in the premises." *United States* v. *O'Donnell, supra,* at 508–509; *Work* v. *United States,* 23 F. (2d) 136, 138 (App. D. C.).

As the court below said, *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, relied upon by petitioners (Pet. 15–18), "is readily distinguishable" (R. Vol. V, p. 162). In that case the lands were "in kind open to sale and conveyance through the Land Department" (209 U. S. at p. 450) under the Act of March 1, 1847, c. 32, 9 Stat. 146, which authorized the disposition of lands within the Lake Superior Land District to preemptors and script locators. See *United States* v. *Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 33, 36. No such statute authorized the disposal of the lands here involved. Cf. *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.

4. Finally, petitioners contend that the United States should be denied relief both under "general principles of equity" (Pet. 10, 11–12; Br. 3–4, 19–31) and under the doctrine of equitable estoppel (Pet. 10, 11; Br. 4, 31–34). The trial court did not pass upon this contention (R. Vol. I, p. 169); the court below rejected it (R. Vol. V, pp. 163–166).

Petitioners' argument is, in substance, that the United States should be bound by the acts of its officers, upon which petitioners relied in purchas-

ing and improving the lands in suit, and should be bound also by their laches in bringing the suit. However, Congress never authorized the Secretary of the Navy, the Commandant of the Navy Yard, the General Land Office, or any other officer of the Government to relinquish the property rights of the United States in the lands in suit. In such circumstances, it is well established that the United States is not estopped to assert its title. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24; *Jeems Bayou Club* v. *United States*, 260 U. S. 561; *Cramer* v. *United States*, 261 U. S. 219; *Standard Oil Co.* v. *United States*, 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied 309 U. S. 673; *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334, 339 (C. C. A. 9). Nor may the United States be denied relief because of its delay in bringing suit or because of its officers' acquiescence in petitioners' expenditures for the purchase and improvements of the land. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Nashville &c Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Insley*, 130 U. S. 263, 266.

Contrary to the statement made in the concurring opinion of the court below (R. Vol. V, p. 166), the judgment may not be characterized as "grossly inequitable." As the court observed (R. Vol. V, p. 165), the rights of those claiming under the

state have been from the beginning "shrouded in doubt and uncertainty." See *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed 136 U. S. 578; *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C. N. D. Cal.); *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.); *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.); *United States* v. *O'Donnell*, 303 U. S. 501. And petitioners and the companies which insured their supposed title (R. Vol. II, pp. 710–711) had means of knowing that Congress had not authorized relinquishment of the lands.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1941

MARY W. STEWART ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Northern District of California (R. Vol. I, pp. 165–176) is reported in 29 F. Supp. 59. The opinion of the Circuit Court of Appeals (R. Vol. V, pp. 148–169) is reported in 121 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. Vol. V, pp. 169–170). A petition for rehearing was denied October 16, 1941 (R. Vol. V, p. 170). The petition for a writ of certiorari was filed January 8, 1942, and

was granted on February 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Mexican grant of Mare Island, "in all its extent," which was confirmed in 1855 by the Board of Land Commissioners as an island "bounded by the water's edge," included all lands above the line of ordinary high tide.

2. Whether a prior suit to which the United States did not consent and was not a party and in which it was held that petitioners' predecessors in interest were entitled to possession of the lands in suit, established "a rule of property" which forecloses the United States from now asserting its title.

3. Whether the Act of March 3, 1891, bars the cancellation of patents for some of the lands which were issued more than six years ~~prior~~ Prior to the present suit, even though Congress never authorized the Land Department to dispose of the lands.

4. Whether the United States is estopped from suing to quiet title to its lands because the petitioners have improved and long been in possession of the lands under patents issued by the United States, where Congress never authorized issuance of the patents or relinquishment of the rights of the United States and the petitioners at all times had means of knowing of the infirmities in their claim of title.

STATEMENT

This is a companion suit to *United States* v. *O'Donnell, et al.*, 303 U. S. 501, and was brought to quiet the Government's title to an area of tule marsh lands lying contiguously northwest of the "O'Donnell" lands on Mare Island in San Pablo Bay, California.

In the *O'Donnell* case, this Court held that the validity of the Castro grant—under which the United States asserts ownership to the whole Island[1]—is no longer open to question, and upheld the title of the United States to the marsh lands there involved. 303 U. S. at 508, 514. In the present case, petitioners, like the defendants in the *O'Donnell* case, claim title under patents from California, the supposed title of California having been obtained from the United States under the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519. While they do not now challenge the validity of the Castro grant, petitioners renew the

[1] Although the Government's ownership of the lands in both cases is claimed under a common title, separate suits were filed because the adverse claimants in each case claimed under separate swamp land surveys by the State of California and also because the "affirmative defenses" asserted by petitioners (R. Vol. I, pp. 37, 70–82, 83–93, 94–95, 131–153) were not advanced by the claimants in the *O'Donnell* case. Petitioners' statement (Br. 14) that "the issues decided in the *O'Donnell* case are entirely different from those presented here," therefore, can have reference only to their affirmative defenses, which are based on the so-called "rule of property," the statute of limitations and equitable estoppel.

contention made and overruled in the *O'Donnell* case [2] that none of the marsh lands, which comprise the greater part of the Island, were included within the grant, because none were within the area commonly known by the name "Mare Island" in 1841 when the grant was made or in 1855 when it was confirmed by the Board of Land Commissioners. The marsh lands lie to the northwest of the high lands where the main plant of the Mare Island Naval Yard is located.

Petitioners also contend that even though the lands were within the confirmed grant, the United States is barred from asserting its title (1) by reason of a "rule of property" said to arise from a prior suit to which the United States was not a party; (2) because the statute of limitations barred the cancellation of patents covering some of the lands involved; and (3) under general principles of equity and the doctrine of equitable estoppel.

The facts essential to an understanding of the case may be summarized as follows:

The Mare Island area.—For the convenience of the Court, a sketch of Mare Island has been inserted as a frontispiece to this brief. The Island is close to the mainland of California and extends in a southerly direction into the Bay of San Pablo. At its southern extremity there is an area of high and

[2] See Brief for Respondent, pp. 22–23, 31–45, and Reply Brief for United States, pp. 18–40, No. 487, October Term, 1937.

dry land of approximately 900 acres, upon which the main plant of the Navy Yard is located. Immediately north of these high lands is a narrow neck or isthmus of reclaimed swamp lands, which were the lands involved in the *O'Donnell* case, and which are known in the record as Survey No. 34. This neck or isthmus joins the high lands on the south to a larger area of reclaimed swamp lands on the north. This latter area, which extends and spreads out fanwise toward the mainland and which is the land in this suit, is known as Survey No. 569. See *Sawyer* v. *Osterhaus,* 212 Fed. 765 (N. D. Cal.).

The Government claims ownership of the entire area bounded on the east by Dutchman Slough, Napa River and Mare Island Straits, on the south by Carquinez Straits, on the west by San Pablo Bay, and on the north by Navy Yard Slough. Petitioners contend that the northern boundary of the Island is, and has always been known to be, at the northern end of the high lands, shown on the sketch as a red line.

Acquisition of title by the United States.—In May, 1841, Alvarado, Mexican Governor of California, granted to Victor Castro the island of "La Yegua" (Mare Island) "in all its extent" (R. Vol. I, pp. 21, 165, 260). By mesne conveyances, Bissell and Aspinwall and another acquired the Castro grant and presented it for confirmation to the Board of Land Commissioners established by the Act of March 3, 1851, c. 41, 9 Stat. 631. The Board

confirmed the grant in a decree dated May 8, 1855, which provides (R. Vol. V, p. 70):

> The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

While these proceedings were pending, a board of naval officers, under Senior Officer J. D. Sloat, recommended that Mare Island be selected as a site for a navy yard and naval depot and commenced negotiations with Bissell and Aspinwall for the purchase of the Island (R. Vol. III, pp. 13–57, 38, 43–50; Vol. II, p. 395). The report of the board described the Island as "bounded on the east by Mare Island straits * * * on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma" (R. Vol. III, p. 26), and the owners stated that it contained about 900 acres of high or dry land and about 1,300 acres of tule or low ground (R. Vol. III, p. 44). On December 10, 1852, the Secretary of the Navy offered to purchase "Mare Island as recently surveyed and reported by" the Board. In his letter of offer he stated that he understood that the proposed deed would cover

> that tract of land known as Mare Island in California including all the tide or low land and marsh belonging to the same, or which

> has ever been reputed or claimed to belong to the same * * *. (R. Vol. III, p. 51.)

The offer was accepted, and on January 4, 1853, Bissell and Aspinwall executed their deed of Mare Island for a consideration of $83,491.00 (R. Vol. III, p. 70). On February 28, 1853, they gave a bond indemnifying the United States against any failure of their title (R. Vol. III, p. 76). The deed described Mare Island in substantially the same terms as those contained in the Secretary's offer of purchase.[3] On February 11, 1853, President Fillmore, by executive order, reserved the Island for public uses "together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island * * *" (R. Vol. III, p. 59).

Petitioners' claim under the Swamp Act.—By the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519, the United States granted to California the swamp and overflowed lands within her borders which were not privately owned. In 1856 the "O'Donnell" lands in the narrow neck or isthmus

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[3] The description in the deed reads as follows: "* * * all that tract of land and Island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter expressed) * * *."

were surveyed by the deputy county surveyor as "Survey No. 34 of Swamp and Overflowed Lands." Thereafter, on June 25, 1869, at the request of one Jacob C. Hinckley, a survey was made of the lands in suit by the county surveyor of Solano County, which became known as Swamp and Overflowed Survey No. 569 (R. Vol. IV, p. 37). Five years later, on April 7, 1874, California issued its patent for the land so surveyed to one John W. Pearson, assignee of Hinckley (R. Vol. III, pp. 185–187).

In 1883 Pearson's successors, under whom petitioners claim, brought an action in ejectment against the Commandant of the Navy Yard to obtain possession of the Survey No. 569 lands. The Commandant, who was represented by the United States Attorney and a Special Assistant appointed at his request by the Attorney General (R. Vol. III, p. 203), defended on the ground that the state patents conveyed no title because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed lands, and on the further ground, *inter alia*, that title was in the United States under the Castro grant. Mr. Justice Field, sitting on circuit, and Judge Sawyer held, however, that since the Swamp Lands Act was a grant *in praesenti*, the absence of a segregation could not defeat the plaintiffs' claim and that they were entitled to show the character of the land by parol evidence. That evidence showed, the court said, that the lands were subject to

"periodical overflow by the rising of the tides" and that large portions were "also separated from the island by navigable sloughs" (28 Fed. at 712, 713). The court concluded that the lands were below the line of ordinary high tide, and, therefore, not included within the Castro grant or confirmation decree.[4] Judgment was accordingly entered against the Commandant. *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708 (C. C. Cal.). This Court affirmed the judgment. 136 U. S. 578 (1890).[5]

By the affirmance of this judgment, officers of the Navy Department felt that the title of the United States "was lost" (R. Vol. III, pp. 262, 264). Dr. L. E. Cross, one of petitioners' predecessors in interest, went into possession of the lands six years later and asked the Commandant for permission to employ a Navy Yard surveyor to locate the southern boundary of his claim. The Commandant agreed with the hope "that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein" (R. Vol. II, pp. 690–692). That same year, 1896, and in 1910 and 1924, patents were issued by the United States to California covering, in the aggregate, all of the lands in suit

[4] Petitioners now admit, as they did in the court below, that the lands were above ordinary high tide (Br. 28).

[5] A detailed discussion of the *Irwin* case is set forth in the Argument, *infra,* pp. 36–41.

(R. Vol. III, pp. 189, 192, 196). On November 10, 1913, a map of the Mare Island Naval Reservation was filed with the Solano County Recorder designating only the high lands and the neck of the island (R. Vol. II, pp. 652–653; Vol. IV, p. 38). Such a map was required by Cal. Stats., 1897, pp. 51–52, ceding exclusive jurisdiction over all United States lands "now held, occupied, or reserved * * * for military purposes or defense."

Meanwhile, permission had been granted by the county to reclaim the lands (R. Vol. III, pp. 225–231), and petitioners' predecessors commenced construction of levees to reclaim them "for general agricultural purposes, stock raising" (R. Vol. II, p. 529). In recent years the northwest portion has been used "mostly for gun clubs," or a "duck club" (R. Vol. II, pp. 631–632, 637). Dr. Cross' son lived on the lands with his family and workmen from 1898 to 1907 (R. Vol. II, pp. 526, 532, 689), and a farmer named Haroid Casebolt testified that he has lived there for seven years, during which time he has been a registered voter of Solano County, voting at Bay Terrace, across the Napa River (R. Vol. II, pp. 635–637). The record does not disclose that anyone else has lived on this land. The Pacific Gas & Electric Company has erected power lines "across the northern section of the gun club" (R. Vol. II, pp. 632–633, 636) under a right-of-way and easement obtained from Dr. Cross in 1911 (R. Vol. I, p. 160). In 1926 to 1928, the Sears Point Toll

Road constructed a toll road of 7.3 miles (R. Vol. II, pp. 677–679) under a franchise from Solano County (R. Vol. II, p. 671; Vol. III, pp. 205–224), after Congress granted a right-of-way across the lands in suit. Act of June 22, 1936, c. 703, 49 Stat. 1819.[6]

Despite the foregoing facts, it is not true, as petitioners assert (Br. 8), that the result of the *Irwin* case "was accepted as final by everyone." The opinion of the Attorney General (R. Vol III, pp. 276–284) and the California act of cession (Cal. Stats. 1854–1855, c. 43, pp. 48–49) referred to by petitioners (Br. 8) antedated the final judgment in the *Irwin* case by more than 35 years and were concerned only with the tidelands abutting the proposed navy yard site.[7] Township plats covering the lands in suit, except the portion which had been formally sectionized long prior to the *Irwin* decision, were not approved until 1923 (R. Vol. IV, pp. 52–54). And final patent to a large portion of the

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[6] This statute was enacted at the request of the Golden Gate Bridge and Highway District, which was acting on the advice of the Attorney General of California (Hearings, H. Committee on Naval Affairs, H. R. 10356, 74th Cong., 2d sess. (1936), pp. 3005, 3007, 3013, 3029). Congressman Welch of California, who sponsored the measure, told the Naval Affairs Committee while this suit was pending (p. 3013) that "The State of California has no quarrel with the Government on the question of title."

[7] For a full discussion of the Attorney General's opinion and the effect of the act of cession, see Reply Brief for Petitioner in *United States* v. *O'Donnell*, No. 487, Oct. Term, 1937, pp. 41–43.

lands was not issued until 1924 (R. Vol. III, pp. 196–201).

The reason for this delay appears clearly from the files of the General Land Office, as disclosed in the record in the *O'Donnell* case. In 1905, the Commissioner of the General Land Office advised the Secretary of the Interior that the whole of Mare Island, including all of the tule marsh lands, was owned by the United States and was under the jurisdiction of the Navy Department so that the Land Department was without authority to survey the section lines (Record in No. 487, Oct. Term, 1937, R. pp. 533–541). Again, in 1912, California "applied for the certification to it of all the swamp and overflowed lands returned as such on U. S. plats of T. 3 N., R. 4 W., and T. 4 N., R. 4 W., M. D. M.," which included a large portion of the lands in suit. After a two-year controversy, the Commissioner rejected the application. His opinion traces the history of the Government's title to all of the tule marsh lands on Mare Island, reviews fully the decision in the *Irwin* case—pointing out also that the rule as to segregation followed in that case was overruled in subsequent decisions of this Court—and refuses "to recognize the claim of the State" because title to the entire marsh area was acquired by the United States under the Castro grant (Record in No. 487, Oct. Term, 1937, pp. 542–551). Because of this ruling, a writ of mandamus was issued from the Supreme Court of the District of Columbia, and in compliance therewith W. J.

Lightfoot, a United States Surveyor, was instructed on January 6, 1915, to make an examination and investigation of the swamp and overflowed lands of Mare Island. In his report of the same year, he concluded that they were a part of the Island (Record in No. 487, Oct. Term, 1937, pp. 181, 596–620).

Again, on January 27, 1921, United States Cadastral Engineer Francis E. Joy was instructed by the General Land Office "to determine the lands properly belonging to Mare Island in 1850." He reported on October 23, 1922, concluding that all the marsh lands bounded by navigable water were parts of the Island and, specifically, that "it [the Island] extended into R. 5 W., bounded on the North by South or Navy Yard Slough." This would include the lands in suit. His plat, as corrected in accordance with further special instructions, was accepted by the General Land Office in November 1923. (Record in No. 487, Oct. Term, 1937, pp. 43, 622–632). Finally, on February 12, 1925, the Secretary of the Navy in protesting to the Secretary of the Interior against the issuance of patents to the lands within Survey No. 34, recited the whole history of the controversy over the swamp and tule marsh lands on Mare Island and unequivocally took the position that the Castro grant "included all of the tule lands which physically formed an integral part thereof." His protest concluded (Record in No. 487, Oct. Term, 1937, p. 561):

> The Navy Department, therefore, maintains that under the foregoing deed of January 4, 1853, it acquired all of Mare Island extending from San Pablo Bay on the south and west to Mare Island Straits and Napa Bay on the east and Sonoma Creek on the north * * *.

These are the same boundaries contended for by the Government in the present case.

Proceedings below.—On April 22, 1930, the Government brought this suit in the United States District Court for the Northern District of California to quiet its title to Mare Island acquired by virtue of its deed from Bissell and Aspinwall. Since the *O'Donnell* case was decided by this Court before the conclusion of the trial in the present case, petitioners withdrew their objections to the validity of the Castro grant, but continued to defend the suit on the ground, overruled in the *O'Donnell* case, that none of the tule marsh lands were included within the grant for the reason that the northern boundary of Mare Island was at the line shown in red on the frontispiece to this brief. The United States contended that the boundaries of the Castro grant were conclusively established by the decree of the Board of Land Commissioners at the "water's edge" or the line of ordinary high tide, and introduced testimony to prove that all of the lands claimed under the decree were above that line.

Toward the end of the trial, petitioners admitted that the lands claimed by the Government were

above the line of ordinary high tide, but denied that the decree of confirmation conclusively established that line as the boundary of the Castro grant. Rather, they contended that under Mexican law the grant could only extend to the line of highest high tide and that the lands in suit were cut off from the high lands of Mare Island by the flow of water across the neck of the island at highest high tide. In other words, they contended that the decision in the *O'Donnell* case to the effect that the neck was part of Mare Island was erroneous. They also took the position that the Castro grant was a grant of a place by name, and that since the record shows that the lands in suit were not known as part of Mare Island prior to the confirmation proceedings, title to them was not confirmed by the Board's decree.

In addition, petitioners advanced three affirmative defenses: (1) as to the lands covered by the patents issued in 1896 and 1910, the suit was barred by the six-year limitation of the Act of March 3, 1891, c. 561, sec. 8, 26 Stat. 1095, 1099; (2) that the southern line of the lands claimed by them had become a public boundary in which the United States had acquiesced and through which California and its successors had obtained a valid title to the lands in suit; and (3) that the United States was estopped from asserting its legal title in this suit in equity.

The trial judge, who also had presided at the trial in the *O'Donnell* case, held for the petitioners

(R. Vol. I, pp. 257–258, 279). Without undertaking to state definitely where he thought Mare Island began or ended, he found that none of the lands in suit ever was a part of Mare Island (R. Vol. I, p. 261). This finding is directly contrary to his finding in the *O'Donnell* case that the lands there involved were a part of Mare Island, since there is no evidence or claim that the lands here involved were separated by water from those involved in that case or were not a part of the place known as "Mare Island" if the *O'Donnell* lands were. His opinion shows that, notwithstanding the fact that petitioners conceded that they could not acquire title by adverse possession as against the United States, he based the decree chiefly upon the ground that even if the lands were included in the Castro grant, petitioners' "open, exclusive, continuous possession * * * preclude the Government from ever establishing its claim to ownership" (R. Vol. I, pp. 175–176).

The trial court also held (R. Vol. I, p. 176), as to the lands for which patents were issued in 1896 and 1910, that the present suit is barred by the Act of March 3, 1891, c. 561, Sec. 8, 26 Stat. 1095, 1099, which requires suit for cancellation of a patent to be brought within six years after issuance of the patent. The court stated (R. Vol. I, p. 169) that it was unnecessary to discuss the merits of the affirmative defenses that a public boundary divides Mare Island from the lands claimed

by petitioners,[5] and that the United States is estopped from asserting its title.

The Circuit Court of Appeals reversed (R. Vol. V, pp. 169–170). The majority held that the confirmatory decree of May 8, 1855, conclusively established the Government's title to all land above mean high-water, and that since it was undisputed that the marsh lands were all above that line (R. Vol. V, pp. 155, 167), title to the entire area was vested in the United States (R. Vol. V, pp. 157–158). The court also held that the Act of March 3, 1891, did not bar cancellation of the patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162), and that under the rule that the United States cannot be prejudiced by unauthorized action of its officials or by laches, the suit was not barred in equity (R. Vol. V, pp. 163–166).[6]

Judge Denman, concurring, stated that he did so "despite the grossly inequitable result arising from the Government's reliance on its freedom from the defense of laches," and expressed the view that this "is peculiarly a case for Congres-

[5] Petitioners have abandoned this defense in this Court. The court below held that it was "too far-fetched to warrant extended comment" (R. Vol. V, p. 163).

[6] The court below held that the land east of Boat Cut-off or Dutchman's Slough (see frontispiece map) was not a part of the Castro grant, since Boat Cut-off was found to be a navigable waterway. It affirmed the judgment of the district court with respect to this land (R. Vol. V, pp. 158–161). The Government has not sought review of this holding.

sional remedial action, beyond the equitable powers of this court" (R. Vol. V, p. 166). Judge Mathews, who dissented, did so upon the ground that the trial court found, in effect, that the lands in suit were not known as a part of Mare Island at the time of the grant to Castro or at the time of the confirmation decree in 1855, and that, therefore, they were not included within the deed to the United States (R. Vol. V, pp. 167–168).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals correctly held that the boundary of the "water's edge" contained in the decree of confirmation conclusively establishes the legal title of the United States to the lands in suit. The "water's edge" is a specific boundary and under the common law, by which the decree must be construed, it means the line of ordinary high tide. It is admitted, and the record establishes, that all of the tule marsh lands here involved were above that line. Indeed, the record shows an unbroken shore line around the entire area claimed by the Government which in the 1850s rose to an elevation which was even higher than the line of highest tide. Thus, even if the words "water's edge" were to be construed according to the Mexican law to mean the line of highest high tide, the title to the lands in suit would have passed to the United States.

In view of the fact that the confirmation decree specified the boundaries of the Castro grant, its extent may not now be determined by reputation evidence as to what was known as "Mare Island" at the time of the grant or decree. Even if such evidence could be relied upon, the record would not support petitioners' contention that the lands in suit were not included.

II

The judgment in *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed, 136 U. S. 578, is not a bar to the present suit. Since the United States was not a party and did not consent to the action in that case, the judgment is not *res judicata* in this case, as petitioners concede. *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Hussey* v. *United States*, 222 U. S. 88.

The contention that the judgment established a "rule of property" from which the courts are not free to depart cannot be supported. The only principles of law which were laid down in that case which are pertinent to this case were that the confirmation decree should be construed as a common law instrument and that, so read, the boundary of the "water's edge" specified in the decree means the line of ordinary high tide. These conclusions are in accord with and support the Government's position in this case. The holding in the *Irwin* case that the lands in question were not included

among those confirmed and did not pass to the United States was based on a finding that they were below the line of ordinary high tide. Such a finding of fact does not give rise to any "rule of property" in the true sense of the phrase. To give the finding in the *Irwin* case binding effect in this suit would seem particularly extraordinary since the evidence shows and petitioners admit that the lands actually were at all times above the line of ordinary high tide.

III

The Circuit Court of Appeals correctly held that the Act of March 3, 1891, which provides that suits to vacate or annul patents to land must be brought within six years after their issuance, does not bar the cancellation of the patents issued in 1896 and 1910 covering a portion of the lands in dispute.

The 1891 Act is applicable only to suits involving patents to "public lands," that is, "to those open to sale and conveyance through the land department." *United States* v. *Minnesota,* 270 U. S. 181, 196; *United States* v. *Winona &c. Railroad,* 165 U. S. 463, 476; *Northern Pac. Ry. Co.* v. *United States,* 227 U. S. 355, 367. Since the lands in suit were not purchased by the United States until January 4, 1853, they obviously were not open to sale and conveyance through the Land Department under the Swamp Lands Act of September 28, 1850, for that act was a grant *in praesenti. United*

States v. *O'Donnell,* 303 U. S. at 509. No contention has been or can be made that the Land Department was authorized by any other statute to open to sale the lands here involved.

IV

The United States is not barred from the relief it seeks in whole or in part by estoppel or any other recognized principle of equity. While it is true that the United States is, generally speaking, subject, as a suitor, to the general principles of equity, its legal rights may not be determined upon general notions of fairness.

Petitioners rely upon the doctrine of estoppel. But Congress has not relinquished the Government's title and it is settled that the United States may not be estopped by the unauthorized acts or laches of its executive or administrative officers. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389.

Furthermore, as stated by the court below, petitioners' claim of title has been "shrouded in doubt and uncertainty" from the beginning (R. Vol. V, p. 165). They have not shown that they were "without knowledge of the true condition of the title" or that they "had no convenient and available means of acquiring such knowledge." *Standard Oil Co. of California* v. *United States,* 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 673.

ARGUMENT

I

THE GRANT OF MARE ISLAND TO THE UNITED STATES INCLUDED THE LANDS IN SUIT

The Circuit Court of Appeals correctly held (R. Vol. V, pp. 154–158) that the decree of confirmation conclusively fixed the specific boundaries of the grant at the line of mean high tide, and that, therefore, since all of the lands in question are admittedly above that line, the ancient reputation of the extent of the grant is immaterial.

A. *The confirmatory decree conclusively fixed the boundaries of Mare Island at the line of ordinary high tide*

The grant to Castro was for Mare Island "in all its extent" (R. Vol. I, pp. 21, 165, 260). The confirmatory decree entered by the Board of Land Commissioners on May 8, 1855, confirmed the title of the Government's predecessors to "Mare Island * * * being an island * * * bounded by the water's edge" (Vol. II, p. 384, Vol. III, p. 1, U. S. Ex. D–1). It is the position of the Government that this decree conclusively establishes a valid title in the United States to all of the lands on the Island above the line of ordinary high tide.

1. The phrase "water's edge", as the court below held (R. Vol. V, pp. 154–156), is synonymous with shore and clearly calls for a boundary at the line of mean high tide. As early as 1864 in *United States* v. *Pacheco*, 2 Wall. 587, this Court held that

when "the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails" (p. 590). And in *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708, 713 (C. C. Cal.), affirmed 136 U. S. 578, upon which petitioners heavily rely and which involved these same lands, the Circuit Court (per Mr. Justice Field) stated that decrees written in the English language must be interpreted according to the common law, and that by that law "the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark." See also *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22–23; *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 506 (C. C. A. 1); *Coburn* v. *San Mateo County,* 75 Fed. 520 (C. C. N. D. Cal.).

This is also the settled rule in California, where it was established by statute as early as 1850 (Woods Digest, 168). *People* v. *Morrill,* 26 Cal. 336, 353–354 (1864); *Wright* v. *Seymour,* 69 Cal. 122, 126–127 (1886); *Heckman* v. *Swett,* 99 Cal. 303, 307 (1883); *Eichelberger* v. *Mills Land, Etc. Co.,* 9 Cal. App. 628, 639–640 (1908); *Forgeus* v. *County of Santa Cruz,* 24 Cal. App. 193, 194–195 (1914). The same rule has at all times been followed by the General Land Office which, by Section 13 of the Act of March 3, 1851, c. 41, 9 Stat. 631, was required to survey all confirmed Mexican

claims.[10] In *Ward* v. *Mulford*, 32 Cal. 365 (1867), where one of the boundaries given in the decree of confirmation was "west by the bay", the court held that the Land Office had correctly surveyed the claim at the line of ordinary high water mark. Similarly, in *Teschemacher* v. *Thompson*, 18 Cal. 11 (1861) the decree confirming the San Mateo Rancho gave as one of the boundaries "the Bay of San Francisco" and the court held that the Land Department properly issued a patent to the line of ordinary high water. See also *More* v. *Massini*, 37 Cal. 432, 433 (1869).

2. That the tule marsh area in both Surveys 34 and 569 was above mean or ordinary high tide at the time of the grant and confirmation proceedings cannot be disputed. To show that the marsh lands have always been above that line the Government introduced a long series of maps, charts, and surveys—all that could be found after a painstaking search—dating from 1775 to the time of trial,[11]

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[10] "All navigable bodies of water and other important rivers and lakes are to be segregated from the public lands at mean high water elevation." Manual of Instructions for the Survey of the Public Lands of the United States (1930), p. 216. See also 1894 edition, p. 56.

[11] U. S. Exhibits. F–2 (R. Vol. II, p. 395, Vol. IV, pp. 1–2); I (R. Vol. II, p. 400); J–1 to J–6 (R. Vol. II, p. 404); K–1 (R. Vol. II, p. 408, Vol. IV, p. 3); K–2 (R. Vol. II, p. 410, Vol. IV, p. 4); K–3 (R. Vol. II, p. 411, Vol. IV, p. 5); K–4 (R. Vol. II, p. 413, Vol. IV, p. 6); K–5 (R. Vol. II, p. 414, Vol. IV, p. 7); K–6 (R. Vol. II, p 417, Vol. IV, p. 8); K–7 (R. Vol. II. p. 418, Vol. IV, p. 9); K–8 (R. Vol. II, p. 613); L–1 (R. Vol. II, p. 428, Vol. IV, p. 10);

as well as expert testimony by hydrographic and geodetic engineers based upon careful studies of tidal observations, physical characteristics, and analysis of previous surveys and reports (R. Vol. II, pp. 395, 400, 557). After this testimony was introduced, petitioners expressly conceded that all of the lands were above the line of mean high tide (R. Vol. V, p. 167), and they renew that concession in this Court (Br. 28). Hence, there is no question that there is and always has been a continuous unbroken mean high tide line all around the island from the Straits of Carquinez on the south to Mare Island Straits and Napa River on the east, through Navy Yard Slough to Sonoma Creek on the north, and San Pablo Bay on

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L–2 (R. Vol. II, p. 430, Vol. IV, p. 11); L–3 and L–4 (R. Vol. II, p. 430); L–5 (R. Vol. II, p. 437, Vol. IV, p. 12); L–6 (R. Vol. II, p. 438, Vol. IV, p. 13); L–7 (R. Vol. II, p. 438); L–8 (R. Vol. II, p. 450, Vol. IV, p. 14); L–9 (R. Vol. II, p. 452, Vol. IV, p. 15); L–10 (R. Vol. II, p. 461, Vol. IV, p. 16); L–11 (R. Vol. II, p. 463, Vol. IV, p. 17); L–12 and L–13 (R. Vol. II, p. 467); L–14 (R. Vol. II, p. 468, Vol. IV, p. 18); L–15 (R. Vol. II, p. 473, Vol. IV, p. 19); L–16 (R. Vol. II p. 474); M–1 (R. Vol. II, p. 476); M–2 (R. Vol. II, p. 478); M–3 (R. Vol. II, p. 479); M–4 (R. Vol. II, p. 480); M–5 (R. Vol. II, p. 481); M–6 (R. Vol. II, p. 482); M–7 (R. Vol. II, p. 559); N (R. Vol. II, p. 484, Vol. IV, p. 20); O (R. Vol. II, p. 548); P–2 to P–4 (R. Vol. II, p. 554); Q (R. Vol. II, p. 557, Vol. III, p. 137); R (R. Vol. II, p. 573, Vol. IV, pp. 21–25); S–1 (R. Vol. II, p. 576, Vol. IV, p. 26); S–2 (R. Vol. II, p. 577, Vol. IV, p. 27); T (R. Vol. II, p. 586, Vol. IV, p. 28); U (R. Vol. II, p. 586); V–1 (R. Vol. II, p. 603, Vol. IV, p. 30); V–2 (R. Vol. II, p. 603, Vol. IV, p. 29); W (R. Vol. II, p. 611, Vol. IV, p. 31).

the west. In short, under every common law concept there has always been only one island, Mare Island, and its northern boundary is Navy Yard Slough to Sonoma Creek.

3. Petitioners contend (Br. 65; Appendix A, pp. i–iii) that under the Mexican law the grant to Castro went, not to the common law line of ordinary high-water mark, but only to the line of the highest high-water. Therefore, they suggest (Br. 65–70), since the confirmation decree should be presumed not to have covered more land than was included within the grant, the words "water's edge" appearing in it should be construed according to the Mexican law. The court below properly held, however, that "It is to be presumed in the absence of internal evidence to the contrary—and the decree contains no such evidence—that the terms used were intended to bear the meaning ordinarily attached to them at common law" (R. Vol. V, p. 156). This holding follows the uniform decisions of this Court and the courts of California to the effect that the confirmatory decrees of the Board of Land Commissioners must be read as common law instruments. *United States* v. *Pacheco, supra; San Francisco Sav. Union* v. *Irwin, supra; Higueras* v. *United States,* 5 Wall. 827, 834; *Valentine* v. *Sloss,* 103 Cal. 215 (1894).

The reason for the rule is plain. The Board had before it a petition in which title to the whole of

the island "in all its extent" was sought to be confirmed. (U. S. Ex. D-1, R. Vol. III, p. 1; R. Vol. II, pp. 384–393.) It was the duty of the Board to ascertain and settle the extent of the title, pursuant to "the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived." Act of March 3, 1851, c. 41, sec. 11, 9 Stat. 631. As the court below pointed out (R. Vol. V, p. 156), the Board functioned "in a common law atmosphere," and it must be presumed that pursuant to the command of the statute the Board took judicial notice or made other appropriate inquiry into the applicable provisions of the Mexican law, usages, and customs, applied them to the Castro grant, and then wrote its decree in the language of the common law.

In further answer to petitioners' suggestion, it is the position of the Government that there is nothing in the ancient Mexican law which prohibited Governor Alvaredo from granting to Castro the entire island down to the line of ordinary high tide and this, we submit, was done. Moreover, even if the lands confirmed were limited to the line of the highest high tide, those here involved would be included, since the record shows an unbroken shore line around the entire area claimed by the Government which in 1852 was from 1.4 to 2.5 feet above even that line. The trial judge did not indicate his views as to the requirements of Mexican law and made no finding as to the elevation of the

marsh lands. The circuit court of appeals declined to "consider the factual argument beyond saying that the record leaves the matter substantially in doubt" (R. Vol. V, p. 156). Nevertheless, petitioners now ask this Court "to dispose of the cause by determining the fact issue" (Br. 63), and advance argument in support thereof in an appendix to their brief (Br. Appendix A, pp. i–xvii). In view of the absence of findings below, we presume that this Court will not review the evidence, but, should the Court deem the matter relevant, we fully show in the Appendix, *infra*, pp. 67–73, that petitioners' contentions are untenable both as to the requirements of Mexican law and as to the elevation of the marsh lands.

B. *The extent of the confirmed grant may not be established by evidence of its ancient reputation*

Petitioners seek to overcome the effect of the mean high water boundary provided for in the confirmation decree by contending that the Board's description of the area confirmed contains two calls—one for "the place called Isla de la Yegua or Mare Island" and the other for the Island "bounded by the water's edge," and that the first one must be accepted as controlling because otherwise the result would be to "expand the Castro grant more than fivefold" (Br. 63–70). This contention is untenable for several reasons:

1. In the first place, we think it clear that the reference to the area confirmed as being the place which is "called 'Isla de la Yegua' or 'Mare

Island' " is not a conveyancer's term which was intended to limit the land described to that area which was then known, or which could be shown nearly 100 years later to have been known, by common reputation as Mare Island. Petitioners cite no case, and we have found none, holding that proof of the precise boundaries of a Mexican grant can be established by reputation evidence as to the area which comprised the grant. Precision in the location of the exterior boundaries of Mexican grants has always been deemed essential; otherwise the grant would fail for uncertainty. *Sena* v. *United States,* 189 U. S. 233, 236, 238, 239; *Arivaca Land & Cattle Co.* v. *United States,* 184 U. S. 649, 652, 653; *Pinkerton* v. *Ledoux,* 129 U. S. 346, 354; *O'Hara* v. *United States,* 15 Pet. 275, 283. Community understanding is altogether too vague a criterion for fixing accurately the exterior limits of any grant or conveyance.

The dissenting judge below expressed the view that the Government's title is limited to the area which was commonly known as Mare Island in 1855, because he was persuaded by certain dictionary definitions of the word "island," cited by petitioners (Br. Appendix, pp. xvii–xviii), that the boundaries given in the decree—"being an Island is bounded by the water's edge"—do not necessarily import a tide water boundary (R. Vol. V, p. 168). We think it is clear, however, that the generally accepted definition is that an island is a body of land entirely sur-

rounded by a natural and constant flow of water and not one that is surrounded by swamp and overflowed lands as defined by the Swamp Lands Act. See "Island," as defined in Bouvier's Law Dictionary; Encyclopedia Americana (1919); New International Encyclopedia (1913); and Webster's International Dictionary; *McBride* v. *Steinweden*, 72 Kan. 508, 515 (1906); *State* v. *Barco*, 150 N. C. 792, 797 (1909); *Payne* v. *Hall*, 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation*, 292 Fed. 822, 826–827 (C. C. A. 3).

2. As we have shown, the grant of an island "bounded by the water's edge" is a grant with a specific boundary and conveys the entire area to the line of ordinary high tide just as if that boundary had been delineated by metes and bounds. Accordingly, even if it might be said that the decree contains two calls, one specific and the other general, under elementary principles of conveyancing law the specific boundary must control. *Prentice* v. *Northern Pacific Railroad*, 154 U. S. 163, 174; cf. *Valentine* v. *Sloss*, *supra*. Indeed, the call for a boundary at the line of mean high tide is a call for a natural boundry.[12] Such a boundary is of the highest character and takes precedence even over calls for courses and distances, as well as over specifications of quantity, which may be stated

[12] Cf. *nunc pro tunc* decree of District Court affirming the decree of the Board of Land Commissioners (U. S. Ex. D–2, R. Vol. III, p. 3; Vol. II, pp. 384–393: "Mare Island, with its natural boundaries").

in the granting instrument. *United States* v. *State Investment Co.*, 264 U. S. 206, 211; *United States* v. *Hancock*, 133 U. S. 193, 196; *Higueras* v. *United States*, 5 Wall. 827, 835; *Lodge's Lessee* v. *Lee*, 6 Cranch. 237; *More* v. *Massini*, 37 Cal. 432, 436–437; *De Arguello* v. *Greer*, 26 Cal. 615, 632.[13]

3. We show hereinafter at pages 32–35 that the record does not support petitioners' contention (Br. 65–67) that the decree, under the holding of the court below, enlarged the scope of the Castro grant. But even if the grant covered less than the decree, resort to evidence of ancient reputation as to the extent of Mare Island would not be permissible to modify the specific boundary named. This Court has uniformly held that where a decree specifies the boundaries of the tract to which title is confirmed, "it is conclusive not only on the question of title, but also as to the boundaries which it specified." *United States* v. *Hancock*, 133 U. S. 193, 196; *United States* v. *Coronado Beach Co.*, 255 U. S.

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[13] The cases cited by petitioner, *Parker* v. *Kane*, 22 How. 1; *Wise* v. *Watts*, 239 Fed. 207 (C. C. A. 9); *Piper* v. *True*, 36 Cal. 606 (1869); and *Haley* v. *Amestoy*, 44 Cal. 132 (1872), are not to the contrary. In *Parker* v. *Kane* this Court held that the specific designation of lots one and six prevailed over the general description "being that part of the northeast quarter lying east of the Milwaukee River," where the lots comprised a portion of that quarter. The other cases are but applications of the familiar maxim in conveyancing "*falsa demonstratio non nocet*" under which, where the particular description covers land which the grantor could not possibly have granted, the court will not let the grant fail if by resort to the general description it is possible to effectuate the intention of the grantor.

472, 487–488; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 184; *Higueras* v. *United States,* 5 Wall. 827, 830, 838; *The Fossat Case,* 2 Wall. 649, 710; *United States* v. *Billing,* 2 Wall. 444, 448; *United States* v. *Halleck,* 1 Wall. 439, 455–456; *Hogan* v. *United States,* 72 F. (2d) 799, 805 (C. C. A. 9). And petitioners concede (Br. 67) that the decree, "no matter how erroneous," is conclusive.

In view of this concession, the reasons for the rule followed in the cases cited need only be indicated. The Board of Land Commissioners was created by the Mexican Claims Act of 1851 "to ascertain and settle the private land claims in the State of California" pursuant to the obligation assumed by the United States under the treaty of Guadalupe Hidalgo to guarantee Mexican property rights in the annexed Territory. Unless the decrees of the Board were thereafter to be accepted as "conclusive," as provided in Section 15 of the Mexican Claims Act, the whole purpose of the statute would fail. Accordingly, despite the countless times that in one guise or another attempts have been made to go behind these decrees to show that the grant confirmed should have included less or more, the courts have uniformly regarded them as final.

4. Finally, we submit that the trial court's finding that the swamp lands were not known "by the name of Mare Island" in the 1850s (R. Vol. I, p. 261) is not supported by the record. On the con-

trary, it was abundantly shown that the whole body of tule land has uniformly been treated and claimed as a part of Mare Island. In the grant Castro claimed Mare Island "in all its extent" (R. Vol. I, pp. 21, 260); the Sloat Board correspondence refers to Mare Island "with all its appendages" (R. Vol. III, p. 54) and to "a large tract of tule extending toward Napa and Sonoma" (R. Vol. III, p. 56); the negotiations with Bissell and Aspinwall show that they wanted five times as much per acre for upland as for "the main body of the tule or low ground" (R. Vol. III, pp. 44, 45); the contract with and deed to the United States covered Mare Island "including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same" (R. Vol. III, pp. 67, 71); the bond given to the United States by Bissell and Aspinwall refers to "Mare Island and its appurtenances" (R. Vol. III, p. 78); and the selection and reservation of Mare Island as a navy yard by President Fillmore refers to Mare Island and "its appendages of Tule or Marsh land ordinarily reputed to belong to said island" (R. Vol. III, pp. 59–60).[14]

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[14] See also the report of the Sanger Board (R. Vol. III, pp. 95, 97, 98, 110); the official log of Mare Island (R. Vol. III, pp. 183–184); the Freeman Survey (R. Vol. III, p. 162); the report of the United States Surveyor General for California for 1883–1884 (R. Vol. III, p. 181); and the following documents in the record in *United States* v. *O'Donnell*, No. 487, October Term, 1937: The protests of

Petitioners argue (Br. Appendix xix–xxii) that the appearance of the words "Mare Island" upon the southern tip of the island on most of the maps is proof of the common reputation of its extent in 1855. They rely chiefly upon the cross-examination of Lieutenant Smith in which he explained the general practice of surveyors (R. Vol. II, pp. 497–504). But on re-direct examination Lieutenant Smith made it plain that the placing of the name by cartographers "has nothing to do with the geographical feature as such" (R. Vol. II, p. 523), and certainly, as the same trial court found in the *O'Donnell* case (R. Vol. I, p. 246), "it was no part of the duties or powers of the persons making said maps to impose local place names on said maps in such manner to prejudice the rights of the United States."

Petitioners also attempt to infer from statements made in the Sloat Board Report that the Board was of the opinion that only the uplands were a part of Mare Island (Br. Appendix xxii–xxvi). However, it is clear from the report as well as the Board's letter to the Secretary of the Navy, written a month later, that the Board found the Island to contain "about nine hundred acres *in addition to a large tract of tule extending toward*

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the Commandant in 1873 to State authorities (R. 800–801), the Lightfoot report (R. 602), the Joy Survey (R. 626–627), and Secretary of the Navy Wilbur's letter to the Department of the Interior, dated February 12, 1925 (R. 552–562).

Napa and Sonoma" (U. S. Ex. F–1; R. Vol. III, pp. 26, 56; Vol. II, p. 395). [Italics supplied.] Petitioners also assert that the Sloat Board surveys limit the Island to the uplands. But the drawings accompanying the report of the Board plainly do not purport to include the whole Island. They are merely a proposed plan of the structures and a sketch of the topography of the area covered thereby; moreover, they show at least a portion of the isthmus as part of Mare Island.

It is submitted, therefore, that the United States acquired valid legal title to the tule marsh lands in dispute by virtue of its deed under the Castro grant and that petitioners' effort to establish title in themselves by reputation evidence is without merit either in law or in fact.

II

THE DECISION IN THE IRWIN CASE DOES NOT FORECLOSE THE UNITED STATES FROM ASSERTING ITS TITLE

Petitioners contend (Br. 18–32) that under the doctrine of *stare decisis* the United States is foreclosed from asserting its legal title because of its long acquiescence in the judgment in *San Francisco Sav. Union* v. *Irwin, supra,* holding that the Government's ownership under the Castro grant did not extend to the lands in suit. "Such adjudication," they say, has become "a rule of property—a rule of the particular title—from

which the courts are not free to depart." (Br. 18–19.)[15]

It is the position of the Government that no true "rule of property," which would bar the United States, has resulted from the decision in the *Irwin* case, and that petitioners' argument is, in substance, no more than an attempt to invoke the doctrine of *res judicata*. However, since the United States did not consent to and was not a party to the suit in the *Irwin* case, which was brought against the Commandant of the Navy Yard in his individual, rather than official, capacity (28 Fed. 708, 715), the decision is not *res judicata* as to the United States. *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Hussey* v. *United States*, 222 U. S. 88, and other cases cited *infra*, p. 44. Petitioners concede (Br. 10) that this is true. Indeed, a holding that the *Irwin* case bars the present case, whether such holding be cast in terms of "*res judicata*," of a "rule of property," or in any other guise, would effectively nullify, in this class of cases at least, the firmly established principle that the rights of the United States may not be the subject of judicial determination without its consent.

(a) In order adequately to evaluate petitioners' contention, it is necessary first to analyze the issues decided in the *Irwin* case. As noted above, p. 2, in that case petitioners' predecessor, who claimed

[15] This contention was urged for the first time at the oral argument in the circuit court of appeals.

title to the lands here in dispute under grants from California, brought suit in ejectment against the Commandant of the Navy Yard. The Commandant defended upon four separate grounds:

(1) He contended first that the plaintiff's claim of title under the Swamp Land grants from California was insufficient to maintain ejectment because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed. The Circuit Court, in an opinion by Mr. Justice Field, rejected this contention and held that the plaintiff was entitled to show the character of the land by parole evidence. Upon appeal to this Court, that was the only question involved, and the Commandant in effect confessed judgment by filing a statement in which it was said "the opinion of the eminent Circuit Justice upon the questions raised by the bill of exceptions, appears to be sustained by the subsequent opinion of this Court in *Wright* v. *Roseberry*, 121 U. S. 488." This Court, accordingly, affirmed *per curiam* by the following decision: "It is conceded by counsel for plaintiff in error that this case is governed by *Wright* v. *Roseberry*, 121 U. S. 488, and the judgment is, therefore, upon the authority of that case, Affirmed." Since the decision in the *Irwin* case, the rule announced in the *Roseberry* decision on the point for which it was cited has been repeatedly repudiated by this Court. See *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land & Lumber*

Co. v. *Rust*, 168 U. S. 589; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; *United States* v. *Chicago, etc. Ry. Co.*, 218 U. S. 233, 242; *McCormick* v. *Hayes*, 159 U. S. 332; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186; see also *Sawyer* v. *Osterhaus*, 212 Fed. 765, 769, 773–774 (N. D. Cal.).

(2) The Commandant also defended the ejectment suit on the ground that the United States had acquired valid title by reason of its adverse possession. The Circuit Court held that the evidence of possession was insufficient, but that, in any event, "we doubt very much whether the United States can acquire title by adverse possession" (28 Fed. at p. 715). A few years later, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, this Court held that the United States could acquire a valid title by prescription, Mr. Justice Field writing a vigorous dissent.

(3) The Commandant also urged in his defense that the lands had been reserved by executive order for naval purposes and therefore did not pass to California. The Circuit Court also rejected this contention. In 1914, however, Judge Van Fleet held to the contrary in *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.), a case involving the adjoining marsh lands which were reserved by the order of President Fillmore in 1853 (R. Vol. III, p. 59).

(4) Finally, the Commandant defended on the ground that title to the lands had passed to the

United States under the Castro grant as confirmed by the Board of Land Commissioners. The Circuit Court overruled this contention, but did so upon the basis of the particular evidence and not upon the basis of any principle of law here in dispute. This Court, as already indicated, did not pass upon the contention, since it was not urged by the Commandant.

The Circuit Court found from the testimony that "the land was subject to periodical overflow by the rising of the tides" (28 Fed. at 712), and concluded as follows:

> * * * the title recognized was only to the island, "bounded by the water's edge." * * * By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the daily tides ebb and flow. *U. S.* v. *Pacheco*, 2 Wall. 589; 3 Kent Comm. 427. If we could pass over the language of the decree, and apply the rule of the civil law, * * * the extent of the land of the island susceptible of private ownership would be less than under the rule of common law. Under neither could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides. Such ownership was all that was conceded

> by the grant to Castro, and the decree affirming the claim of his grantees under it. Large portions of the land in controversy are also separated from the island by navigable sloughs. (28 Fed. at 713.)

The holding that the lands in suit were not covered by the confirmation decree thus appears to have been based on the view that they were below the line of ordinary high tide, and, therefore, without the boundary specified in the decree. The court held that the decree should be read as a common, rather than civil, law instrument, but was persuaded that in either case it did not include the lands in question, since the court considered that under both the common and civil law lands below ordinary high-water mark were not susceptible of private ownership.

Petitioners dispute this interpretation of the decision in the *Irwin* case. They say (Br. 29–30) that the court did not find that the lands were below mean or ordinary high-water mark because such a holding would have meant that the lands were tidelands rather than swamp and overflowed lands, and, therefore, passed to California as an attribute of state sovereignty rather than under the Swamp Lands Act. It is clear from the opinion, however, that the court was not concerned with whether the lands were swamp and overflowed or tidelands, since in either event they would have passed to California if they were not a part of the Castro grant.

See *San Francisco* v. *Le Roy,* 138 U. S. 656, 671; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 183–184; *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 487; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15. It is equally clear that the court was of the view that all lands above the ordinary high-water mark were included in the grant to Castro and the decree affirming the claim of his grantees under it.

Petitioners now concede (Br. 28) that the lands in suit have always been above the line of ordinary high-water mark; indeed, they even assert (Br. 28–29) that the evidence before the court in the *Irwin* case showed that "all of the lands were, just as we have admitted them to be, above ordinary high water mark." In effect, therefore, they concede that the decision in that case was erroneous.

In sum then, we have a decision which, as we have shown, is admittedly wrong on the facts and which, in so far as it laid down any principles of law other than those which are in accord with our construction of the confirmation decree, has been repudiated by this and other courts. No "rule of property" barring the instant suit can be said to have arisen from such a decision. If the opposite were true, it would seem that the United States should have been likewise barred in the *O'Donnell* case, since the holding in the *Irwin* case as to the extent of the Castro grant and confirmation decree was equally applicable to the

swamp lands there involved.[16] Indeed, if a "rule of property" can ever be based upon a decision of a question of fact, it would seem that the *O'Donnell* case furnishes a "rule of property" in favor of the Government quite as strong as the "rule of property" in favor of petitioners sought to be derived from the *Irwin* case. For, as we have indicated (*supra*, pp. 3–4, 16), if the decision in the *O'Donnell* case that, as a factual matter, the lands there in suit were part of the Castro grant is accepted as binding in this case, it necessarily follows that the lands here in suit were also a part of the grant.

(b) By a "rule of property" is meant, not "a rule of the particular title", as petitioners assert (Br. 19), but a legal principle governing the ownership and devolution of property. It amounts to no more than a strict application of the doctrine of *stare decisis*. *United States* v. *Standard Oil Co. of Calif.*, 20 F. Supp. 427, 455 (N. D. Cal.), affirmed, 107 F. (2d) 402, 415 (C. C. A. 9), certiorari denied, 309 U. S. 673; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 583. "It relates only to questions of law" (2 Freeman, *Judgments* (5th ed., 1925) sec.

[16] It is no answer to urge, as petitioners apparently do (Br. 19), that the *O'Donnell* case, unlike the instant, did not involve the same lands as those involved in the *Irwin* case. The principle of the "rule of property" is, of course, neither the same as *res judicata* nor as "the law of the case", but "embodies the legal maxim that a principle or rule of law which has been established by the decision of a court of controlling jurisdiction will be followed in other cases involving a similar situation." 2 Freeman, *Judgments* (5th ed., 1925), sec. 630, p. 1329.

630, p. 1329) and does not foreclose subsequent factual inquiries as to true ownership.

The distinction may be clearly illustrated by the very cases cited by petitioners (Br. 19–23). Thus, in *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, upon which they primarily rely (Br. 19–21), this Court refused to re-examine the rule of law established by prior decision to the effect that Indian claimants under Mexican grants were, like all other grantees, required to present their titles for confirmation to the Board of Land Commissioners. Obviously, a reversal of that rule would have had a far-reaching effect. The Court accordingly rested upon its prior decision as a "rule of property." This, however, does not support the contention of petitioners, because they do not rely upon any principle of law established by the *Irwin* case. They rely instead upon the particular result, although based, as we have shown, upon a factual issue which was decided upon evidence different from that here present and which petitioners concede would have to be decided differently upon the present record.

Similarly, in each of the other cases where petitioners cite, the plaintiffs sought to have a legal principle overruled and a different principle applied to facts substantially the same as those involved in the earlier case; the decisions stand for no more than the familar doctrine that where titles to land may be affected the courts strictly adhere to the doctrine of *stare decisis*. None of them

stands for the proposition urged by petitioners that in a suit between different parties a court will not reexamine the facts with respect to a chain of title or receive new evidence as to the validity or extent of a grant. Cf. *Richardson* v. *Schwoon*, 3 Tenn. App. 512, 534, 540 (1925); *Magoon* v. *Davis*, 84 Me. 178 (1892); *German Protestant Orphan Asylum* v. *Barber Asphalt Pav. Co.*, 26 Ky. L. 805, 808 (1904).

A contention similar to that urged by the petitioners was rejected by this Court in *Hussey* v. *United States*, 222 U. S. 88. In that case, the Supreme Court of California had found in a prior suit against a government officer, who had been represented by a United States district attorney pursuant to direction of the Attorney General and the Secretary of the Treasury, that the owner of a one-half interest in community property had not ratified the sale to the United States. In a subsequent suit, the Court of Claims accepted the principles of community property law enunciated by the California court, but disagreed as to the facts and found that there had been a ratification. On appeal to this Court, the plaintiff urged, as petitioners do here, that "the judgment of the Supreme Court of California became a rule of property and conclusive of the validity of the title" (222 U. S. at pp. 92–93). This Court held, however, that the contention "is not tenable" (*id.* 93) and rested its decision simply on the ground that the Government is not concluded by the judgment in a prior suit to which it did not consent

and was not a party. The instant case calls for a similar determination. *Carr* v. *United States*, 98 U. S. 433, *United States* v. *Lee*, 106 U. S. 196, 217, 222; see *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *United States* v. *Candelaria*, 271 U. S. 432; *Privett* v. *United States*, 256 U. S. 201; *Priest* v. *Las Vegas*, 232 U. S. 604, 611; *Succession of Barth*, 178 La. 847 (1934).

III

THE STATUTE OF LIMITATIONS DOES NOT BAR THE CANCELLATION OF THE SWAMP PATENTS ISSUED IN 1896 AND 1910

The Circuit Court of Appeals correctly overruled (R. Vol. V, pp. 161–162) petitioners' contention that the Act of March 3, 1891, c. 561, sec. 8, 26 Stat. 1095, 1099, is a bar to the present suit insofar as it seeks the cancellation of the two swamp patents isued in 1896 and 1910.[17] That Act provides:

> * * * suits by the United States to vacate and annul any patent * * * shall only be brought within six years after the date of the issuance of such patents.

In substance, petitioners' argument on this point may be stated as follows: Even though the United States acquired a good title from Bissell

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[17] No contention is made that this statute bars cancellation of the patent issued on April 26, 1924 (R. Vol. III, p. 196), since the six-year period had not run at the time of the institution of this suit, April 22, 1930.

and Aspinwall, it conveyed certain portions of the lands away by its patents of 1896 and 1910, and the statute now bars the Government from recovering such lands. Unless this be the argument, the contention is meaningless, for the United States admits that if the lands were not included in the deed to it, petitioners' swamp land patents are valid irrespective of any statute of limitations.

The argument overlooks important and controlling considerations. It is firmly settled that the Swamp Lands Act was a grant *in praesenti*. *United States* v. *O'Donnell*, 303 U. S. 501, 509. And since the United States did not acquire its title from Bissell and Aspinwall until January 4, 1853, it obviously did not convey the lands to California under the Swamp Lands Act, which was enacted on September 28, 1850. As this Court said in the *O'Donnell* case (p. 510), the Swamp Lands Act, by its terms, "could not include lands which the Government had not acquired." Consequently, since the lands did not pass under the Swamp Lands Act, and there is no other statute authorizing their disposal, petitioners' patents are worthless, for it has long been settled that where Congress has made "no provision" for the sale of the lands, a purported patent attempting to convey them "would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Schurz*, 102 U. S. 378,

404; *Steel* v. *Smelting Co.*, 106 U. S. 447, 452; *Davis's Administrator* v. *Weibbold*, 139 U. S. 507, 529. Such a patent "is a simple nullity" (*United States* v. *Conway*, 175 U. S. 60, 68), and "it remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act." *United States* v. *O'Donnell*, 303 U. S. at 509; *Work* v. *United States*, 23 F. (2d) 136, 138 (App. D. C.).

Accordingly, it is clear that the limitation provision of the Act of 1891 is wholly inapplicable to the lands here in dispute, for, as this Court has consistently held, that Act is "strictly a part of the public land laws" (*United States* v. *Minnesota*, 270 U. S. 181, 196) and is confined in scope to "public land of the United States," that is, to land "open to sale and conveyance through the land department." *United States* v. *Winona &c. R. R.*, 165 U. S. 463, 476; *Northern Pac. Ry. Co.* v. *United States*, 227 U. S. 355, 367; *United States* v. *Whited & Wheless*, 246 U. S. 552; *Newhall* v. *Sanger*, 92 U. S. 761; *La Roque* v. *United States*, 239 U. S. 62, 68. As this Court pointed out in the *O'Donnell* case, 303 U. S. at 510, "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition * * *."

Petitioners contend, however (Br. 33), that "this Court has held that a claim of want of jurisdiction in the Land Department affords no defense or ex-

ception to the statute." They cite *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447. But, as the court below held, the *Chandler-Dunbar Co.* case "is readily distinguishable" (R. Vol. V, p. 162), and nothing that was there said may be construed as a departure from the settled rule that "the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always open for judicial determination." *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 18; *Smelting Co.* v. *Kemp*, 104 U. S. 636.

The lands in the *Chandler-Dunbar* case were "in kind open to sale and conveyance through the Land Department" (209 U. S. at p. 450) under the Act of March 1, 1847, c. 32, 9 Stat. 146, which authorized the disposition of lands within the Lake Superior Land District to preemptors and script locators. See *United States* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 33, 36 (C. C. A. 6). In other words, in that case there was a statute which, apart from the question of the Presidential reservation, authorized the Land Department to dispose of the lands. In the present case, there is no such statute. The Swamp Lands Act no more authorized the Land Department to dispose of the lands in suit than it did any other after-acquired lands purchased by the United States for military uses, federal building sites, or for any other purpose.

Petitioners erroneously assume that the Land Department would have had no jurisdiction to issue

a patent to the lands in the *Chandler-Dunbar* case "if the land was in fact reserved at the time of the patent" (Br. 33). The very point upon which that case turned was that the patents were invulnerable because the lands, "whether reserved or not," were "in kind open to sale and conveyance through the Land Department" under the Act of March 1, 1847. In other words, the *Chandler-Dunbar* case would be applicable to the facts here only if the Government were relying upon the reservation by President Fillmore (R. Vol. III, p. 59) to show that petitioners' lands were not patentable, and there were some statute like the Act of March 1, 1847, authorizing disposition of the lands. Cf. *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 32.

Relying upon the dictum in *United States* v. *Coronado Beach Co.*, 255 U. S. 472, to the effect that the Government's attempt in that case to go behind the patent issued for a confirmed Mexican grant was foreclosed by the Act of March 3, 1891,[18] petitioners argue that the statute is not limited to public lands of the United States (Br. 35). In

[18] That the sentence from the opinion upon which petitioners rely was *obiter* seems clear. The case was brought pursuant to statute as a special proceeding to determine and condemn private rights in North Island in San Diego harbor. The defendants claimed under a confirmed Mexican grant for which a patent was issued and the Court held, as the basis for its decision, that the boundaries fixed by the decree of confirmation were conclusive, citing *Knight* v. *U. S. Land Association*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; and *Beard* v. *Federy*, 3 Wall. 478. (See Point I, *supra*.)

that case, however, the Government argued that the Land Department exceeded its jurisdiction in issuing the patent, not because there was no statute authorizing the disposal of the lands, as is the case here, but because they were tidelands, which prior to the admission of California as a state were "public lands" of the United States and should not have been conveyed to the confirmee. (See Argument of Counsel, 255 U. S. at p. 478.) Hence, even if the Government's position on the merits had been sound, the Court correctly observed that under the *Chandler-Dunbar* case, as well as the other cases we have cited, holding the statute applicable to public lands, the attack upon the patent was barred by the statute. Nothing in the case, however, remotely supports petitioner's contention that the statute is applicable to all patents issued for lands which the United States acquires by private purchase for military purposes and which Congress has not authorized the Land Department to convey.[19]

Petitioners' argument that "If the holding below be correct, no title under the Swamp Land Act is protected by the statute of limitations" (Br. 39) is patently frivolous. As we have pointed out

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[19] *Hogan* v. *United States*, 72 F. (2d) 799, 806–807 (C. C. A. 9), certiorari denied, 295 U. S. 752, and *Putnam* v. *Ickes*, 78 F. (2d) 223, 227–228 (App. D. C.), certiorari denied, 296 U. S. 612, also cited by petitioners (Br. 35), are not in point for each of them stands only for the rule that decrees of confirmation and patents issued pursuant thereto are conclusive.

above, in invoking the statute of limitations petitioners are not asserting title under the Swamp Land Act, but, on the contrary, they claim that even though neither the Swamp Lands Act nor any other act of Congress authorized the disposal of the lands in suit, their patents must be held good. Such a contention twists the Act of 1891 from a statute of repose, which it was intended to be, into a sweeping conveyance and results in the unthinkable consequence that, after six years, the United States would be powerless to attack any patent, however obtained and regardless of the site covered.

Accordingly, we submit that, since the Swamp Lands Act was a grant *in praesenti,* any patent issued by the Land Department under the purported authority of that Act to lands acquired after its passage is, under the authorities we have cited, a "nullity" and that a suit to cancel it is in no way barred by the limitations of the 1891 Act.

IV

THE UNITED STATES IS NOT BARRED FROM THE RELIEF IT SEEKS BY ESTOPPEL OR BY ANY OTHER PRINCIPLE OF EQUITY.

Petitioners contend that the United States should be denied relief both under "general principles of equity" (Br. 40–49, 50) and under the doctrine of equitable estoppel (Br. 51–62). This contention is predicated upon (1) the Government's "acquiescence" in the "definitive decision" of this Court in the *Irwin* case "as to this identical title";

(2) the issuance of patents by the Land Department; and (3) the action of the Navy Department (a) in maintaining the present Navy Yard fence "ever since 1914", and (b) in filing a map with county officials in 1913 which did not include the tule marsh lands as part of the area over which the United States claimed exclusive jurisdiction (Br. 44). The district court expressly declined to pass upon the merits of petitioners' contention (R. Vol. I, p. 169), and the court below overruled it (R. Vol. V, pp. 163–166). We shall show that the United States is not barred from the relief it seeks either in whole or in part by estoppel or any other recognized principle of equity.

1. *The United States is not barred by "general principles of equity."*—It is true that the United States is, generally speaking, subject, as a suitor, to the general principles of equity. See *Brent* v. *Bank of Washington*, 10 Pet. 596, 614, cited by petitioners (Br. p. 45). This rule is, however, subject to exceptions. As we show more fully hereinafter (pp. 54–56, 57–61, 63–65), laches and estoppel, both doctrines of equity, apply to the United States only to a limited extent, if at all. Nor does the rule mean, as petitioners urge, that the legal rights of the United States are to be determined upon general notions of fairness without regard to precedent or established principles.[20] Accordingly it gains

[20] "Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standards of right and justice, independently of fixed rules, he

petitioners nothing merely to characterize the decree below as a "grave injustice," "grossly inequitable," "against all conscience," as an "unusual spectacle" and as a "phenomenon of a court of equity figuratively throwing up its hands and declaring that it is without power to stay its own action in perpetrating this injustice" (Br. pp. 40, 41, 44, 50). *Bond* v. *Hopkins,* 1 Schoales & L. 413, 429 (1802); *Gee* v. *Pritchard,* 2 Swanston, 402, 414 (1818); Pomeroy, *Equity Jurisprudence* (5th ed., 1941) sec. 62, p. 82.

We think it apparent that petitioners' argument amounts to no more than a new guise for their contention at the trial (R. Vol. I, pp. 37, 94–95; cf. pp. 168, 258–259), which they abandoned in the court below (see R. Vol. V, p. 161), that their undisturbed possession of the lands "for 40 years" (Br. pp. 3, 16, 27) has ripened into a valid prescriptive title. It is settled, however, that "mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States" *Sparks* v. *Pierce,* 115 U. S. 408, 413; *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, 347.[21] The reason for the rule is two-

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would not attempt to exercise the *arbitrium boni viri*; on the contrary, he is governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges." *Pomeroy's Equity Jurisprudence* (5th ed., 1941), sec. 47, p. 62.

[21] To the same effect see *Morrow* v. *Whitney,* 95 U. S. 551, 557; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 391; *Hays* v. *United States,* 175 U. S. 248, 260; *Tyee Consolidated*

fold. In the first place, the Constitution (Art. IV, sec. 3, cl. 2) gave Congress alone "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," and, therefore, "Having the power of disposal and of protection, Congress alone can deal with the title * * *." *Jourdan* v. *Barrett*, 4 How. 168, 184. In the second place, the principle *nullum tempus occurit regi* "is applicable to all governments * * * and is essential to a preservation of the interests and property of the public." *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 158.

This rule, we submit, becomes largely nugatory if a court of equity will enforce a colorable title, like that asserted by petitioners, because of a reluctance to oust intruders upon government property. *Lindsey* v. *Miller*, 6 Pet. 666, 673. Legal title to the lands in suit being vested in the United States, only Congress can convey them away (10 Op. A. G. 34); and the courts may not, any more than executive officers, undertake to apply equitable principles against the United States where, as here, it sues in its sovereign capacity to preserve the integrity of its military

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Min. Co. v. *Langstedt*, 136 Fed. 124, 127 (C. C. A. 9); *Reed* v. *St. Paul, M. & M. Ry. Co.*, 234 Fed. 123, 124 (W. D. Wash.); cf. *Stanley* v. *Schwalby*, 147 U. S. 508, 517; *United States* v. *Dastervignes*, 118 Fed. 199 (N. D. Cal.), affirmed, 122 Fed. 30 (C. C. A. 9).

reservations which are held "in trust for all the people." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Pan-American Co.* v. *United States,* 273 U. S. 456, 506; *Causey* v. *United States,* 240 U. S. 399, 402; *Heckman* v. *United States,* 224 U. S. 413, 446–447.

If this were a controversy between private parties, petitioners' plea that the plaintiff should not be permitted "to wrest from the private owners [sic] the lands they have so long held and enjoyed" (Br. 4) might be upheld on the ground that the parties have proceeded on the basis of a mutual mistake and that it would work an undue hardship upon petitioners to require them to vacate the lands. But this argument has been urged against the Government before without avail except in instances where Congress has enacted compensatory relief. The underlying reasons are stated in the opinion of the Court in *Causey* v. *United States, supra.* That was a suit brought by the United States to recover the title to lands which had been patented. The defendant contended that the bill should be dismissed because the United States did not offer to return the scrip which it had received for the land. In answer to this contention, the Court said (p. 402):

> * * * the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all

> the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. [Citing cases.]

See also *United States* v. *Insley*, 130 U. S. 263, 266; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, at 32; *Utah Power & Light Co* v. *United States*, 243 U. S. 389, 409; *Jeems Bayou Club* v. *United States*, 260 U. S. 561; *Sutton* v. *United States*, 256 U. S. 575; *Crespin* v. *United States*, 168 U. S. 208; *Hayes* v. *United States*, 170 U. S. 637.

Furthermore, contrary to the statement made in the concurring opinion of the court below (R. Vol.

V, p. 166), the judgment may not be characterized as "grossly inequitable." As the court below observed (R. Vol. V, p. 165), the rights of those claiming under the state have been from the beginning "shrouded in doubt and uncertainty." See *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed 136 U. S. 578; *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C. N. D. Cal.); *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.); *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.); *United States* v. *O'Donnell*, 303 U. S. 501; and see pp. 11–14, *supra*. And petitioners and the companies which insured their supposed title (R. Vol. II, pp. 710–711) had means of knowing that Congress had not authorized relinquishment of the lands.

2. *The United States is not barred by equitable estoppel.*—Petitioners misread the opinion below as holding "that the Government is not subject to equitable estoppel" and say that "the essence of the holding is * * * that upon some supposed principle of public policy the sovereign is not subject to the defense" (Br. 51). The Circuit Court of Appeals announced no such sweeping rule and it is not necessary for us to contend that the United States is in all cases immune from this defense; it is significant, however, that petitioners have been unable to cite, and we have been unable to find, a single case in which this Court has held the United States estopped, despite the vast number of cases

in which that contention has been urged.[22] On the other hand, this Court has not declared that the United States can never be estopped.

But regardless of whether estoppel can, under any circumstances, operate against the United

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[22] Of the cases examined, that most closely presenting a holding of estoppel against the United States, although it does not use that term, and although the United States was not a party to the suit, is *Lindsey* v. *Hawes*, 2 Black 554, 560. In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289, however, that case was referred to as resting upon a construction of acts of Congress. Petitioners also cite (Br. 46), *American Propeller, etc., Co.* v. *United States*, 300 U. S. 475, in which this Court refused to allow interest upon the Government's counterclaim for taxes, because demand for payment had not been made as required by statute. No question of equitable estoppel was involved and the quotation from the Court's opinion contained in petitioners' brief is wholly inapplicable to the instant case. See *United States* v. *Shaw*, 309 U. S. 495, and *United States* v. *U. S. Fidelty Co.*, 309 U. S. 506, where the Court held that the doctrine of *United States* v. *The Thekla*, 266 U. S. 328, set forth in petitioners' quotation from the *American Propeller* case, is limited to "claims for collision in admiralty."

Petitioners rely upon two decisions from the Circuit Court of Appeals for the Eighth Circuit, *State of Iowa* v. *Carr*, 191 Fed. 257 and *United States* v. *Denver & R. G. W. R. Co.*, 16 F. (2d) 374, and one from the Sixth Circuit, *United States* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, in which it was held that under the circumstances there presented an equitable estoppel would lie. But see, from those same circuits, *McDonald* v. *United States*, 89 F. (2d) 128 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Fiman* v. *South Dakota*, 29 F. (2d) 776 (C. C. A. 8), certiorari denied, 279 U. S. 841; *Utah Power & Light Co.* v. *United States*, 230 Fed. 328, 342 (C. C. A. 8); *Union Pac. Ry. Co.* v. *United States*, 67 Fed. 975, 979 (C. C. A. 8); *Lake Superior Ship Canal, Ry. & Iron Co.* v. *Cunningham*, 44 Fed. 819, 833 (C. C. W. D. Mich.), affirmed, 155 U. S. 354.

States, it is clear that the majority below held only that in the present suit, the "unauthorized conduct on the part of its [the Government's] officers, or arrangements or agreements by them," upon which petitioners rely, "do not constitute a defense or give rise to an estoppel" (R. Vol. V, p. 165).

Plainly, this holding is correct. Congress has never relinquished the Government's claim of title to the lands in suit. The defense of equitable estoppel is therefore reduced to a charge that the United States is bound by the action or nonaction of its officers. But neither the Secretary of the Navy, the Commandant of the Navy Yard, the General Land Office, nor any other officer of the Government had any authority to relinquish the property rights of the United States in the lands in suit, and under these circumstances it is well established that the United States can neither be bound nor estopped. *Cramer* v. *United States*, 261 U. S. 219; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24; *Jeems Bayou Club* v. *United States*, 260 U. S. 561.

Utah Power & Light Co. v. *United States, supra*, was a suit in equity by the United States to enjoin power companies from using certain lands of the United States for works for the generation and distribution of electric power, and to recover compensation for past use. The power companies contended that certain statutes authorized their use of

the lands. This contention was resolved against them by the Court. The companies further contended that the United States was barred from challenging their right to use the lands since Government officials had entered into agreements consenting to the construction and operation of the works and had silently acquiesced in the expenditure of huge sums for them. Rejecting this contention, the Court said with respect to the alleged agreements (pp. 408–409):

> * * * Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee* v. *Munroe*, 7 Cranch 366; *Filor* v. *United States*, 9 Wall. 45, 49; *Hart* v. *United States*, 95 U. S. 316; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291.

With respect to acquiescence in the construction and operation of the works, the Court said (p. 409):

> * * * This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest, *United States v. Kirkpatrick*, 9 Wheat. 720, 735; *Steele* v. *United States*, 113 U. S. 128, 134; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Insley*, 130 U. S. 263, 265–266; *United States* v. *Dalles Military Road Co.*, 140 U. S. 599,

632; *United States* v. *Michigan,* 190 U. S. 379, 405; *State ex rel. Lott* v. *Brewer,* 64 Alabama 287, 298; *State* v. *Brown,* 67 Illinois 435, 438; *Den* v. *Lunsford,* 20 N. Car. 407; *Humphrey* v. *Queen;* 2 Can. Exch. 386, 390; *Queen* v. *Black,* 6 Can. Exch. 236, 253. * * * A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey* v. *United States,* 240 U. S. 399, 402.

That the officers of the Land Department acted without authority in issuing the patents here involved is evident from the facts hereinbefore discussed. The decision in the *Utah Power & Light Co.* case is, therefore, applicable to their acts. It is conclusive also that the United States would not be estopped even if the officers of the Navy Department affirmatively represented to appellees that the Government had abandoned its claim of title to the lands. See *Utah* v. *United States,* 284 U. S. 534, 545–546.

Indeed, it is doubtful whether the United States would be estopped in this case even under the principles applicable in a suit between private individuals. It has long been settled that before there can be an estoppel affecting title to land the legal owner must be guilty of "intentional deceit" or at least of "that gross negligence which is evidence of

an intent to deceive". 3 Pomeroy, *Equity Jurisprudence* (5th ed., 1941), sec. 807, p. 202, and cases cited. As this Court held in *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 335–336:

> For the application of that doctrine [equitable estoppel] there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. * * *

See also *United States* v. *Standard Oil Co. of California*, 20 F. Supp. 427, 452 (S. D. Cal.), affirmed, *Standard Oil Co. of California* v. *United States*, 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 673.

The building of a fence, the surveying of the lands, the issuance of patents, and the recording of

maps, the facts relied upon by petitioners, would seem to fall far short of showing either "intentional deceit" or "gross negligence" amounting to fraud. Nor can petitioners claim that they had "no convenient and available means" of knowing "the true condition" of their title (*Standard Oil Co. of California* v. *United States, supra*), for, as Judge Healy observed, "the facts respecting the tidal conditions obtaining on the island were at least within the possibility of knowledge on the part of claimants willing to take note of those conditions or desirous of investigating the available evidence" (R. Vol. V, p. 164). Cf. *United States* v. *Walker River Irr. Dist.* 104 F. (2d) 334, 339 (C. C. A. 9). And petitioners admit that they knew that the judgment in the *Irwin* case was not *res judicata* against the United States (Br. 10).

Petitioners recognize that they may not invoke the doctrine of laches, but many of the facts upon which they base their estoppel argument have to do with the delay of the United States in bringing this suit some 40 years after the decision in the *Irwin* case (Br. 3, 16, 19, 26, 27). Similarly, the fact that the United States has not asserted its title "for half a century" weighed heavily with the trial judge (R. Vol. I, p. 175) and was the sole basis for Judge Denman's observation that the Government's case is "grossly inequitable" (R. Vol. V, p. 166). But it is clear that delay in bringing suit "is not an element of estoppel. It is an element of laches. And laches do not affect the rights of the Government."

United States v. *Standard Oil Company of California, supra,* at p. 454. As long ago as 1824, Justice Story observed in *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735:

> The general principle is, that *laches* is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. * * *

Again in *United States* v. *Beebe,* 127 U. S. 338, this Court declared (p. 344):

> The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, *however gross,* in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. * * * [Italics supplied.]

To the same effect, see *United States* v. *Nashville &c. Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Insley,* 130 U. S. 263, 266; *Steele* v. *United States,* 113 U. S. 128, 134.[23]

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[23] If there is any exception to the principle that the United States cannot be barred by laches, it is limited to commercial transactions of the United States. See *Cooke* v. *United States,* 91 U. S. 389, 398; *United States* v. *Bank of the Me-*

Other facts upon which petitioners base their contention that the United States may be estopped deal with the "acquiescence" of the United States while petitioners expended large sums for the purchase and improvements of the land (Br. 19, 26, 42). Any such "acquiescence," however, on the part of Government officials or agents cannot bar the United States from asserting its title to lands validly acquired. *Utah Power & Light Co.* v. *United States, supra,* p. 409; *Morris* v. *Bean,* 146 Fed. 423 (C. C. Mont.), affirmed, 221 U. S. 485; *United States* v. *Conrad Inv. Co.,* 156 Fed. 123 (C. C. Mont.), affirmed, 161 Fed. 829 (C. C. A. 9); and cases cited *supra,* pp. 39, 64. "No estoppel arises from mere delay, acquiescence, or nonaction, even if it results in inducing expenditures." *United States* v. *Standard Oil Company of Calif., supra,* at p. 454.

It is therefore submitted that the United States is not barred from quieting its legal title under the doctrine of equitable estoppel. To hold otherwise would require the overthrow of firmly embedded principles of public land law "having their roots in necessary public policy" (R. Vol. V, p. 165).

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tropolis, 15 Pet. 377, 392; *United States* v. *Barker*, 12 Wheat. 559, 561. "Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion." *Cooke* v. *United States*, *supra*, at 398. That the present suit is brought by the United States in its sovereign character is clear. Cf. *United States* v. *Minnesota*, 270 U. S. 181, 194.

CONCLUSION

It is respectfully submitted that the judgment below is correct and should be affirmed. The legal title to the lands in suit has been in the United States since the purchase of them in 1853. There may be circumstances indicating that petitioners, to the extent they are not insured, should be reimbursed by the Government for expenditures in improving the lands or for other costs, but only Congress can so decide. The matter is "beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government." *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.

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APPENDIX

A. NOTHING IN THE MEXICAN LAW IS INCONSISTENT WITH THE GRANT TO CASTRO OF ALL THE LAND ON MARE ISLAND TO THE LINE OF MEAN HIGH TIDE.

Preliminarily, we wish to emphasize that in contending that the lands in suit are not a part of Mare Island, petitioners are, in effect, making a direct attack upon the findings made in the *O'Donnell* case as to the extent of the Castro grant. In other words, petitioners do not contend that the lands in suit were below the "highest high tide" line of Mexican law; rather, they urge only that the narrow isthmus involved in the *O'Donnell* case ~~were~~ was below that line, thereby severing their lands from the highlands of the island. It is the position of the Government, however, that there is nothing in the Mexican law which is inconsistent with the finding made in the *O'Donnell* case that the Castro grant conveyed all the land to the line of mean high tide.

Apart from the testimony of Professor Radin (R. Vol. II, pp. 617–624), petitioners offer nothing that was not urged in the attack made on the findings of fact in that case. Moreover, Professor Radin's testimony adds nothing new, for respondents urged in the *O'Donnell* case,[24] as petitioners do here (R. Vol. II, p. 617), that the court may take judicial notice of the Mexican law, citing

[24] Brief for Respondent, pp. 33–34, Oct. Term, 1937, No. 487.

United States v. *Chaves*, 159 U. S. 452. The whole section of the code provision upon which petitioners rely is as follows (R. Vol. II, p. 623): *Las Siete Partidas*, Part III, Tit. 28, Law IV, Hall, *Laws of Mexico* (1885 ed.) sec. 1466, p. 448):

> Every man who chooses may build a house or cabin upon the seashore as a retreat, and he may erect there any other edifice whatever to serve his purposes; provided he does not thereby interfere with the use of the shore, which everyone has a right in common to enjoy. He may also build galleys there, or any other vessel whatever; or stretch or mend his nets; and when he is there, or employed for or other purposes of a similar nature, no one has a right to disturb him. By the seashore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

Certainly there is nothing in this section which precludes a finding that the Castro grant conveyed the lands to the ordinary high-tide line, perhaps with the right of the public to use the foreshore. Mexico, through its authorities, could grant even the seashore. Cf. *Jover* v. *Insular Government*, 221 U. S. 623, 629–633; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 486–487; Hall, *Laws of Mexico* (1885 ed.) sec. 1699, p. 515. No special words were necessary for such a grant, nor was any special authorization required under the law. See, for example, *Teschemacher* v. *Thompson*, 18 Cal. 11, 20–21 (1861); *Ward* v. *Mulford*, 32 Cal. 365 (1867). The grant from Gover-

nor Alvarado to Castro conveyed the whole of Mare Island "in all its extent" (R. Vol. I, p. 21), and it is clear that the definition of an island under the civil law is the same as that accepted by the courts of this country, i. e., a body of land entirely surrounded by a natural and constant flow of water. The mere fact that the land may be surrounded by water occasionally or at high tide does not make it an island. *McBride* v. *Steinweden,* 72 Kan. 508, 515 (1906); *State* v. *Barco,* 150 N. C. 792, 797 (1909); *Payne* v. *Hall,* 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation,* 292 Fed. 822, 826–827 (C. C. A. 3). In the civil law an island is defined as "a certain portion of land entirely surrounded by the waters of the sea or of a river."[25] See also *Las Siete Partidas* Part III, Tit. 28, Laws XXVII–XXX (Hall's translation, pp. 450–451; Scott's translation, pp. 827–828).[26] Hence it is plain that when Governor Alvarado granted to Victor Castro the whole of Mare Island "in all its extent" he granted an island surrounded by a continuous flow of water and not by sporadic high tides or storm spray, as petitioners urge.

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[25] "ISLA. Cierta porcion de tierra rodeada enteramente de agua por de mar o' por algun rio." Dictionario Razonado de Legislacion y Jurisprudencia. Por Don Joaquin Escriche (Magistrado Honorario de la Audencia de Madrid). Nueva Edicion (Paris, Mexico, 1925), p. 934.

[26] Professor Radin says that Scott's translation is "quite inaccurate" (R., Vol. II, p. 623). But see 14 Amer. Bar Ass'n J., pp. 219, 223–224 (1928). A comparison of the sections relied upon in the two translations fails to disclose any material difference between them.

B. THE ANNUAL HIGHEST HIGH TIDE DID NOT REACH ACROSS THE NARROW NECK OR ISTHMUS

It is the further position of the Government that even if it may be said that the grant to Castro, under Mexican law, extended only to the line of highest high tide, the record nevertheless shows that the elevation of the sand ridge on the San Pablo Bay side of the *O'Donnell* lands was well above even that line. Petitioners' argument is based chiefly upon the testimony of George L. Cross, son of a former claimant to the lands in suit, to the effect that when he was living on the island from 1898 to 1907 he frequently saw the lands in Survey 34 under water (R. Vol. II, pp. 528, 533). From this, they conclude that some half a century earlier, in 1852, the lands were below the line of the highest high tide or, as they put it, the "line of highest high water throughout the year." Obviously, such testimony is wholly without probative value. The issue here is the condition or elevation of the neck of land in 1852, and not in 1900.

While the elevation of the tule marsh lands was but ⅔ to 1 foot above the line of mean high tide (R. Vol. II, pp. 581, 589, 606–607), the testimony shows that a sand ridge barrier extended throughout the length of the isthmus in question,[27] the ele-

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[27] Petitioners contend that, apart from U. S. Exhibit T (R. Vol. IV, p. 28)—which they now argue "is in error" (Br. xvi)—"There is no evidence that there was any sand ridge at the narrows of the neck" (Br. xiii–xvi). Lieutenant Smith of the Coast and Geodetic Survey testified, however, in explanation of an aeroplane map of the island, that this sand ridge "appears very plainly" at a point 6,400 feet from the steam engineering building (R. Vol. II, p. 447) and it

vation of which was above the mean highest high tide. The Court's attention is respectfully directed to U. S. Exhibit T (R. Vol. IV, p. 28; Vol. II, p. 586) prepared under the direction of Captain Carl A. Carlson, and to his explanation thereof (Vol. II, pp. 577–583, 586–597). This exhibit consists of a plat of cross-sections of the land in controversy, made from actual surveys in 1856, 1906, 1917, and 1931, which shows the profiles of the land and tides for each of these years according to the usual engineering method (R. Vol. II, p. 582). The exhibit makes clear that the elevation of the land in 1852 was from 8 to 9.1 feet above mean low water and from 1.4 to 2.5 feet above the spring high tide line, which is the highest high tide line of the year.

Attention is particularly directed to the profile second from the bottom on the exhibit, designated

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is plain from the whole of his testimony, as well as other evidence in the record, that the ridge extended through Survey 34. Thus he was of the positive opinion that the storm barrier, which he identified, was unquestionably the one that existed in 1856 "a little less than 100 feet back from the shore line as surveyed by Rodgers" (R. Vol. II, pp. 601, 602–607). The Rodgers Survey of 1856, as well as the Lawson Survey in 1886, are shown in the Record on a transparent sheet superimposed upon an aerial photograph (R. Vol. IV, p. 30) and, as Lieutenant Smith testified (R. Vol. II, p. 606), these surveys, made 30 years apart, showing a continuous unbroken and almost identical shore line, prove that certainly the same condition existed throughout this isthmus. He further testified that where there is a long fetch of water where the waves will break, such as San Pablo Bay, the waves will build up a sand barrier (R. Vol. II, p. 602) and that if water flowed across it during the highest tides, there would have been some physical evidence by way of a channel, which is not shown on either the Rodgers or the Lawson survey (R. Vol. II, pp. 608–609).

as "station 60," which corresponds to the southern boundary of the so-called "neck" (R. Vol. IV, p. 28). Following the heavy black line, which is drawn to indicate the elevation of the land at this station in 1852 (see explanatory notes "Re: Station 60" at lower right of the exhibit), the Court will readily see that the land in this section was at that time well above the spring high tide, or, to use petitioners' language, the highest high water throughout the year.

It is true, as shown by the enlarged section on Station 2, redrawn to a larger scale at the bottom of the exhibit, that the storms of December 1914 and 1921 caused the tide to rise three feet above the line of mean high tide, or about one-tenth of a foot above the so-called boundary land at Station 60, but such tides are far higher than the annual high tide. Indeed, the witness Cross admitted that the water he saw on the land may have come from such extreme high tides (R. Vol. II, p. 536).[25] But, as the trial court indicated at the trial, we are not "concerned with abnormally high tides" (R. Vol. II, p. 512). Furthermore, if such extreme storm

[25] Cf. the Joy report made pursuant to the direction of the United States Surveyor General in 1922 (No. 487, Oct. Term, 1937, R. p. 626): "The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tides and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay."

tides be the criterion by which boundaries may now be determined, titles to land along the whole west coast of California and along both coasts of Florida rest on extremely tenuous grounds.

Petitioners assert (Br. pp. vii–xiii) that three plates introduced in evidence by the Government, showing the tidal regimen for November 1929, and for February and June 1905 (U. S. Ex. R. Vol. IV, pp. 21–23; Vol. II, pp. 572–573) establish their contention because they indicate that the tides rose as much as a foot above mean high tide during those months. But since Exhibit T shows that the elevation of the lands in 1852 was from 2.2 to 3.3 feet above the line of mean high tide, it is clear that these plates completely harmonize and corroborate that exhibit, for each of them shows that during these specimen months the tides did not rise to that elevation. In other words, they plainly disprove the contention that the lands here involved were inundated by the tides several times a month in 1852.

It is therefore submitted that petitioners' entire argument by which they contend that the decree of confirmation is not binding as to them under the ancient Mexican law relating to tide lands is without any tenable basis either in law or in fact.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 848.—October Term, 1941.

Mary W. Stewart, et al., Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 25, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This is a suit by the United States to quiet its title to a large area of tule marsh lands lying northwest of the Mare Island Navy Yard in San Pablo Bay in California. *United States* v. *O'Donnell*, 303 U. S. 501, was a similar suit to quiet the Government's title to marsh lands lying between the high land on which the Navy Yard is located and the lands in controversy, which terminated favorably to the Government. In both cases the Government deraigned title through a grant by the Mexican Governor of California to one Castro and certain mesne conveyances by Castro and his grantees. In both cases the defendants claimed title under the State of California on the theory that the State acquired the lands under the Swamp Lands Act of September 28, 1850.[1] The *O'Donnell* case involved the validity of the grant to Castro, the validity of the decree of the Board of Land Commissioners confirming that grant, the question of priority of right as between the United States as purchaser of the land granted to Castro and the State of California and its grantees under the Swamp Lands Act. The decision in that case settled these questions in favor of the Government.

In the *O'Donnell* case it was contended that the lands there in controversy were not embraced within the grant to Castro. The District Court found against the contention and the Circuit Court of Appeals approved the finding. We refused to review the concurrent findings of the lower courts.

In the present case, the petitioners do not contest the rulings in the *O'Donnell* case. Their defences are that their lands, which

[1] c. 84, 9 Stat. 519, 43 U. S. C. § 982.

they hold under patents issued for swamp and overflowed lands, under the Swamp Lands Act, were never part of the land granted to Castro by the Mexican Governor and further that, if they were, the decision in *San Francisco Savings Union* v. *Irwin*, 28 Fed. 708, affirmed 136 U. S. 578, constitutes a ruling as to their title which ought now to be followed. In addition, they claim that the action of the United States is barred by the Act of March 3, 1891[2] which prohibits suit by the United States to annul any patent after six years from the date of issue. They also contend that laches, estoppel, and failure to undertake to do equity as a condition of obtaining the desired relief require a decree dismissing the bill.

The case was tried before the same District Judge who presided at the trial of the *O'Donnell* case. Upon the basis of the pleadings and proofs, he made, *inter alia*, the following findings of fact bearing upon the defence that the lands in controversy were not included in the grant to Castro or the confirmation thereof and hence never passed to the United States as ultimate transferee of Castro's title:

That none of the lands involved was ever a part of Mare Island.

That none of these lands was, either at the time of the grant to Castro or at the time of the proceedings for confirmation of the grant, a part of the lands known as, or referred to as, or by the name of Mare Island.

That none of the lands was embraced in or covered by the grant of Mare Island to Castro.

That none of the lands was ever occupied by, or in possession of, Castro.

That none of the lands was claimed as a part of, or to be a part of, Mare Island.

That none of the lands was covered by, or embraced within, the confirmation proceedings or the order of confirmation of the Board or the decree of the District Court confirming the order of confirmation of the Board.

That none of the lands was purchased or acquired by the United States as part of its purchase of Mare Island.

The judge also further made findings that the petitioners' title was derived from the United States through the State of California under the Swamp Lands Act. He concluded the action

[2] c. 561, § 8, 26 Stat. 1095, 1099.

was barred by the Statute of Limitations and that the United States was not the owner of the lands in suit.[3]

The Circuit Court of Appeals reversed the decree by a vote of 2 to 1.[4] The dissenting judge said: "The District Court found, in effect that the 'place' which at the time of the grant to Castro and at the time of the confirmation to Bissell and Aspinwall was called Isla de la Yegua or Mare Island, did not include any of the land here in controversy. The finding is amply supported by evidence."

The majority of the court did not overrule the findings of the District judge above outlined. After making a reference to the evidence they said: "But whatever may be the fact there is no occasion to inquire into the extent of Castro's occupancy, or into the matter of early repute." They held that, whatever the extent of the Mexican grant to Castro, the decree of the Board of Land Commissioners, made pursuant to the Act of March 3, 1851,[5] established a definite boundary—the line of ordinary high water mark—which was controlling. It is conceded that a portion of the marsh lands embraced in Survey No. 34, which are the lands involved in the *O'Donnell* case, are, and have been, above ordinary high water mark. The court held that there was some land above that mark in the narrow neck of land conveyed by Survey No. 34 and connecting the high land on which the Navy Yard is constructed with the large tract of about 7500 acres covered by Survey No. 569, which constitutes the land in this suit. Construing the decree of the Commissioners in accordance with the common law of California in force at the time of the confirmation of the Castro grant, the Court held that the tract confirmed to Castro's grantees comprised not only the high land on which the Navy Yard stands but the narrow strip to the northwestward embraced in Survey No. 34 and the large tract of tule marsh lying still farther to the northwestward embraced in Survey No. 569. On account of the importance of the questions involved we granted certiorari.

We are of opinion that, in the light of the District Court's findings, which are undisturbed, the Circuit Court of Appeals erred in reversing the District Court's judgment. It is evident that the Circuit Court of Appeals accepted, or at least did not

[3] 29 F. Supp. 59.
[4] 121 F. 2d. 705.
[5] c. 41, 9 Stat. 631.

overrule, the findings of the District Judge. If, as we think, these findings were supported by substantial evidence, there is no principle of law which requires a decision that the decree of confirmation extended the tract actually granted to Castro so as to embrace the marsh lands, title to which is in controversy.

The record before the Commissioners shows that, on October 30, 1840, Castro petitioned that he be granted an island called "Mare Island", that the Governor *ad interim* granted his petition on October 31, 1840, and that on May 2, 1841, the Governor of the Californias, one Alvarado, confirmed Castro's ownership in fee of the same island "in all its extent", which he designated as "the Island named La Yegua". There was no evidence before the Commissioners, and none in the trial of this case, to the effect that Castro occupied any portion of the tule marsh in controversy. The testimony before the Commissioners was devoted almost entirely to the question of the authenticity and good faith of the grant to Castro. The only evidence with respect to the size or extent of the island was that given by a witness Vallejo who resided near it. He testified that the island was two and one-half miles in length and contained about half a league of land. This description does not include the marsh land involved in the present case but covers only the high land where the Navy Yard is located.

The petition of Bissell and Aspinwall for a confirmation to them of title to the lands granted to Castro by the Commissioners was filed August 31, 1852. It stated that the subject of the grant was "the island called 'Isle de la Yegua'" and asked that the Commissioners confirm to them the said "tract of land". The decree of the Commissioners, after stating that the claim was valid and the application for confirmation should be allowed, continued: "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isle de la Yegua' or Mare Island and being an island is bounded by the water's edge."

It is undisputed that the original grant to Castro was governed by the Mexican law and that, under that law, the title of an owner of land bordering on navigable waters ran to the line of the highest high tide. The record contains evidence indicating that, at such highest tide, the neck of land to the northwestward of the high land on which the Navy Yard is located was covered, at least at certain points, by water. This fact could not alter boundaries

definitely fixed by the Commission's decree, which is to be interpreted according to the common law in force in California at the time it was entered. Under the common law, the boundary would be the line of ordinary high water. But the boundary of the Mexican grant is of some significance in determining what the Mexican Governor intended to, and did in fact, grant to Castro, especially as both grant and confirmation referred to the tract as what is named or called Mare Island.

It is to be observed that the decree of confirmation refers not to a tract of land but to a "place" and to the place which "is called" Mare Island.

At the time the decree of confirmation was entered several early maps of the area existed which, although they did not designate Mare Island by any name, showed the high land as entirely surrounded by water. They indicate a channel across the low neck of marsh land to the westward of the high promontory on which the Navy Yard is constructed.

Coming to about the date of the grant and confirmation, we find several significant maps. One of these, made by an Army lieutenant in 1848, shows an actual break at the northerly end of the high land and indicates that, at this point, water covered the land, at least at high tide. The island thus delimited is marked on the map "Mare Island" and the low tule marsh to the northwestward is not comprehended in the area so designated. Another, made by one Ellis in 1852, marks the high land "Mares Island". All the area to the northwest of the high land, including the land in controversy, is shown as water. A third, made by one Ringgold, a Commander of the Navy in 1850, shows the swamp land to the northwest of what is now the Navy Yard tract but designates only the latter as Mare Island.

Seven United States Coast and Geodetic Survey Charts dated respectively 1851, 1851, 1856, 1859, 1861, 1863, and 1915, designate only the high land by the name of "Mare Island". The United States Geological Survey prepared maps of the Napa quadrangle and the Mare Island quadrangle in 1902 and 1916. In each the high land is marked Mare Island and the land in controversy is marked "Island No. 1". The State Geological Survey of California prepared a map in 1873 which applies the name "Mare Island" to the high land.

San Francisco Savings Union v. *Irwin, supra,* was tried about 1885. The Coast and Geodetic Survey prepared a map for use in

that case which shows only the high land as constituting Mare Island. In the trial of the instant case it was testified that the land in controversy has been for some years known as "Cross Island."

Shortly before the Government purchased Mare Island, and as a basis of the purchase, a Board of Officers known as the Sloat Board reported on the island as a site for a navy yard. This report was made before the confirmation proceedings were concluded. One of the plans attached to the report purports to be a plan of Mare Island showing its topography. The plan covers only the high land. The report states that Mare Island is "bounded on the east by Mare Island Straits which separates it from the City of Vallejo on the west by the bay of San Pablo and on the north by a large tract of tule land extending several miles in the direction of Sonoma." The report speaks of the "north end" of the island as more uniform than the southerly end so that it may easily be reduced to a convenient grade. These remarks cannot well apply to the tule marsh in question. The report states that the island contains "including the tule opposite Vallejo, about 900 acres." There is a further statement that the whole length of the island is about two miles. This describes only the high land as the length would be about ten miles if the tule marsh in controversy were included.

The foregoing facts seem to us to furnish adequate support for a finding that what was granted to Castro was the high land known at the time as Mare Island and not the great extent of tule marsh lying to the northwestward of the former which was apparently not occupied or claimed by Castro or commonly understood to be a part of the land called Mare Island. All that the decree purported to confirm was the title to a "place . . . called . . . Mare Island". Even if the high land was connected by a narrow neck with the tule marsh to the northwestward, that high land might still be called an island either because the narrow neck of low marsh land to its westward was sometimes flooded or because the name "island" was colloquially applied to a piece of land which a geographer would more accurately call a peninsula.[6]

[6] It is common knowledge that lands not in fact surrounded by water are sometimes called islands. See, Century Dictionary; Webster's New International Dictionary; Encyclopedia Brittanica, 14th Ed., Vol. XII, p. 715; Vol. III, p. 381. And compare California State Geological Survey Map of 1873 showing lands called Deer Island, Simms Island, and Green Island.

The Court of Appeals, however, held, and the Government here urges, that the facts recited are immaterial in view of the terms of the decree of confirmation. The undoubted principle that when such a decree defines the boundaries of a tract with precision, the decree cannot be attacked on the ground that the boundaries named were erroneous,[7] is invoked. But the question remains whether the petitioners' contention in this case amounts to such an attack. The description in the decree of confirmation is at best but a vague one. It is of a "place . . . called . . . Mare Island." If there were nothing more it would be competent to show what was in fact the place so known or called. The Government's contention is, however, that, because the Commission added that, being an island it was bounded by the water's edge, this supererogatory statement gives a fixed and definite boundary which overcomes any vagueness inherent in the designation of the place granted. We think no such strict rule has been applied in the interpretation of deeds or, indeed, of decrees of confirmation of Mexican grants in like circumstances. On the contrary, courts have repeatedly resorted to evidence of what was commonly known and called a ranch, or lot, or other place, in order to correct erroneous boundaries stated in a deed description or a decree of confirmation.[8] Thus to explain the meaning and extent of a decree is not to attack it for error but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.

We are of opinion that the evidence in question was of probative value; that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed, and that the proofs furnished a basis for a finding of fact that the land in controversy was not a part of that granted to Castro and confirmed to his vendees. This view renders it unnecessary to discuss the other questions presented by the petitioners. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

So ordered.

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[7] United States v. Halleck, 1 Wall. 439; Higueras v. United States, 5 Wall. 827; United States v. Hancock, 133 U. S. 193.

[8] Parker v. Kane, 22. How. 1; United States v. De Haro, 25 Fed. Cas. 803; Piper v. True, 36 Cal. 606; Haley v. Amestoy, 44 Cal. 132; Wise v. Watts, 239 Fed. 207.